TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 157

LEWIS M. STEVENS, SUCCESSOR TO JOSEPH LAWLER AS SECRETARY OF HIGHWAYS OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL., APPELLANTS,

vs.

J. K. CREASY, WILLIAM W. McNAMEE, JACK C. MARSHELL, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FILED JULY 7, 1958
PROBABLE JURISDICTION NOTED OCTOBER 13, 1958

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 21, 1958

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 13672 Civil Action

J. K. Creasy, William W. McNamee, Frank Ranallo, A. W. Tuiccillo, Ed Kleeman and R. G. Cummiskey, on behalf of themselves and other property owners and lessees similarly situated,

vs.

Lewis M. Stevens, Successor to Joseph Lawler, as Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania,

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Docket Entries

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Aug. 1 Complaint entered, affidavit attached.

Aug. 1 Summons issued.

Aug. 1 Motion filed and temporary restraining Order entered directing that the defendants be and hereby are enjoined from enforcing with reference to highway until hearing on application for an interlocutory injunction. Marsh, J.

Aug. 8 Order of Court received from John Biggs, Jr., Chief Judge designating the Hon. Austin L. Staley, a Circuit Judge, and the Hon. John L. Miller, to sit with Rabe F. Marsh, Jr., Judges of the U. S. District Court for Western District of Pa. to hear and dispose of the above entitled case.

Aug. 11 Praecipe for appearance of atty. Leonard Mendelson for defendant, filed.

Aug. 12 Summons returned served.

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Aug. 12	Summons returned served on 8/9/55 with copy of Motion and Temporary Restraining Order.
Aug. 26	Answer of defendant filed.
Aug. 26	Notice of Motion for Summary Judgment filed, acceptance of service thereon.
Aug. 26	Defendants' Motion for Summary Judgment filed.
Sept. 2	Order of Court entered permitting Amendment to Complaint be filed; Waiver of defendants; Amendment to Complaint filed; Defendant to answer within 20 days.
Sept. 7	Answer to Amendment to Complaint filed. Acceptance of service thereon.
Oct. 18	Request for admissions under Federal Rule 36 filed by plaintiff, acceptance of service of copy thereon.
Oct. 26	Response to request for admissions under Federal Rule 36, filed, with acceptance of service thereon by attorneys for plaintiffs.
Nov. 1	Order of Court entered directing consolidation for pre-trial hearing and trial of Civil Actions Nos. 13672 and 13841. Further Ordered that a pre-trial hearing is fixed for Friday Dec. 2, 1955 at 10:00 AM.
Nov. 16	Motion to Amend for Summary Judgment, filed. Consented to by counsel Order of Court entered granting defendants' motion to amend Motion for Summary Judgment.
Nov. 25	Affidavit of Leonard P. Kane offered by plaintiffs in opposition to motion for summary judgment, filed.
Nov. 25	Affidavit of Samuel Rothman offered by plaintiffs in opposition to motion for summary judgment filed.
Nov. 25	Affidavit of Maurice L. Kessler filed.

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Nov. 25 Affidavit of Albert W. Tuccillo in opposition to motion for summary judgment filed.

Nov. 25 Affidavit of J. K. Creasy in opposition to motion for Summary judgment filed.

Nov. 29 Affidavit of J. Cal Callahan offered by plaintiffs in opposition to motion for summary judgment, filed.

Dec. 2 Affidavit of Donald M. McNeil in support of Motion for Summary Judgment filed, acceptance of service of copy thereon. (filed 13672 CA)

[fol. 2]

Dec. 2 Affidavit in opposition to Motion for Summary Judgment filed by Plaintiffs Pawel and Mary Werbitsky.

Dec. 2 Affidavit in opposition to Motion for Summary Judgment filed by Plaintiffs Edward K. and Marcella A. Nanz.

Dec. 2 Affidavit in opposition to Motion for Summary Judgment filed by H. Mitchell, plaintiff.

Dec. 2 Pre-trial hearing before Staley, Marsh & Miller, J's begun.

Dec. 2 Pre-trial hearing concluded.

Dec. 2 Trial memo filed. (The stipulations are to be filed within two weeks or on Dec. 16, 1955, also all exhibits and names of witnesses to be used in the case.)

Dec. 2 Hearing on Motion by Defendant for Summary Judgment begun before Staley, Marsh & Miller J's.

Dec. 2 Hearing on Motion by Defendant for Summary Judgment concluded.

Dec. 2 Hearing memo filed. (Briefs will be filed by Dec. 16, 1955, and an appropriate order will be made.)

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Dec. 9 Transcript of official notes of proceedings taken at the Pre-trial Conference and hearing on Motion for Summary Judgment held at Pgh., Pa., Friday, Dec. 2, 1955 before Staley, J., Marsh, J. and Miller, J., filed.

Dec. 15 Order of Court entered extending time to December 20, 1955 for plaintiff's filing of supplemental briefs, Stipulation, etc.; Consented to by attorneys for defendants.

Dec. 16 Statement in compliance with Court Instructions filed by plaintiffs; service of certified copy thereon.

Dec. 16 Motion filed, Order of Court entered allowing defendants answer be amended as set forth in the within motion. Consent of plaintiffs thereon.

Dec. 19 Stipulation counsel re Airport Parkway, etc., filed.

Dec. 19 Agreement of counsel re defendant's Motion for Summary Judgment filed.

Dec. 19 Memorandum to Court regarding witnesses, etc., filed.

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Feb. 17 Transcript of Proceedings of Pretrial Conference Feb. 13, 1956 at Pgh., Pa. before Hon. Staley, Marsh & Miller, filed.

Feb. 20 Order of Court entered dismissing Defendant's Motion for Summary Judgment, Exception noted to defendants. (Marsh, J.)

Feb. 29 Order of Court entered directing the written agreement of plaintiffs and defendants docketed Dec. 19, 1955 is hereby nullified. (Copy of agreement attached) Miller, J.

Feb. 29 Order of Court entered directing that all persons having a question of law and a question of fact in common with the plaintiffs in the above captioned action, shall intervene as named plain-

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tiff on or before March 22, 1956, or thereafter be barred from such intervention without good cause shown for failure to intervene on or before the said date. The Court shall proceed as to those plaintiffs named as of that date. (Miller, D.J.) Notice of order acknowledged by counsel for plaintiffs.

Mar. 16 Motion to intervene filed Mr. & Mrs. Wm. E. Bell, et al.

Mar. 16 Motion to intervene filed by Hugh J. Murdoch, et al.

Mar. 16 Order entered permitting intervention of parties plaintiff, Hugh J. Murdoch, et al. & Mrs. Wm. E. Bell, et al.

Mar. 16 Petition for leave of Florence Webb to intervene as party plaintiff, approved by the Court, and filed.

Mar. 16 Petition for leave of Joseph Adams to intervene as party plaintiff, approved by the Court and filed.

Mar. 19 Notice of petition for injunction, Acceptance of service, and petition for injunction, filed by counsel for the defendant.

Mar. 19 Notice of Motion to require plaintiffs to furnish bond, acceptance of service, and Motion to require plaintiffs to furnish bond, filed by defendant.

Mar. 21 Objections to Motion to require plaintiffs to furnish bond, filed by plaintiff.

Mar. 21 Answer to Petition for Injunction, filed by plaintiffs.

Mar. 21 Requests for Findings of fact, filed by plaintiffs.

Mar. 21 Stipulation of counsel that all matters of record, etc. shall be considered part of the record, etc., filed.

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Mar. 21 Stipulation of counsel as to relevancy of certain matters, filed.

Mar. 22 Hearing before Staley, C.J., and Marsh and Miller, District Judges on Motion for interlocutory Injunction and for continuance of Restraining Order.

Mar. 22 Hearing concluded; trial memo filed.

[fol. 3]

Mar. 22 Motion of Fisher Oil Company, to intervene, and Notice of said motion filed, and Order entered allowing Fisher Oil Company to intervene in the within case.

Mar. 22 Complaint of Intervenor, Fisher Oil Company, filed.

Mar. 27 Answer to Complaint of Fisher Oil Company, filed. Certificate of mailing copy attorneys for Fisher Oil Co., thereon.

Mar. 28 Stipulation of counsel and affidavit of Arthur M. Barnes, Secretary of Fisher Oil Co., intervenor re Intervenor's Complaint will exceed sum of $3,000.00, filed.

Mar. 29 Stipulation of counsel for Commonwealth of Pennsylvania and Joseph Adams re damage to property filed.

Mar. 29 Affidavit of value of property that abutts Airport Parkway, filed by Joseph Adams.

Mar. 29 Stipulation of counsel for the Commonwealth of Pennsylvania and Florence Webb re damage to property, filed.

Mar. 29 Affidavit of value of property that abutts Airport Parkway, filed by Florence Webb.

Apr. 2 Affidavit of value of property filed by Charles Sodini, Anna J. Price, Charles William Price, Santa M. Scally, Joseph Scally.

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Apr. 3 Acceptance of service of Notice for defendant, filed.

Apr. 4 Transcript of Proceedings of hearing held Pgh., Pa., 3/22/56 before Judges Staley, Marsh & Miller, filed.

Apr. 11 Defendants' request for Findings of Fact in connection with Plaintiffs' application for injunction, filed.

Apr. 11 Defendants' request for Findings of Fact in connection with defendants' petition for injunction, filed.

Apr. 12 Plaintiffs' supplemental requests for Findings of Fact and Conclusions of Law, filed. Acceptance of service thereon.

Apr. 13 Stipulation of counsel re-amending zoning ordinance and defendants' request for Findings of Fact, filed.

May 1 Order of Court by Staley, Circuit Judge, Rabe F. Marsh and John L. Miller, District Judges entered, directing (1) that all proceedings in this Court in these matters be stayed until a definite construction of the Act of May 29, 1945 P.L. 1108, as amended, by the State Courts be had, provided that the parties diligently pursue the remedies in the State Courts; (2) that the temporary restraining order heretofore entered on 8/1/55 in Civil Action No. 13672 be continued in force and effect until further Order of this Court; (3) that the request of the defendants for an injunction against J. K. Creasy and his wife and George J. Paulos and his wife and the request of the defendants that the palintiffs (sic) be required to file bond are hereby severally denied, without prejudice, however, to the defendants to renew their application in the State proceedings and without prejudice to seek such further relief in the State courts as they may deem fit and proper.

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Dec. 28 Petition to dissolve temporary restraining Order and to dismiss complaint filed by defendants.

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Jan. 2 Notice of defendant's Petition to Dissolve Temporary Restraining Order and to Dismiss Complaint filed.

Jan. 7 Answer to petition to dissolve temporary restraining order and to dismiss Complaint, filed. Acceptance of service thereon.

Feb. 12 Hearing on Petition to dissolve Temporart (sic) Restraining Order and Dismiss Complaint before Judges, Miller, Marsh & Staley, begun.

Feb. 12 Hearing concluded C.A.V. Trial memorandum filed. (H. Thomas, Reporter)

Feb. 19 Order entered that the petition filed by the defendants to dissolve the Temporary Restraining Order and to dismiss the Complaint is hereby denied. Staley, C.J., Marsh, D.J., and Miller, D.J.

Apr. 5 Transcript of official notes of hearing held 2/12/57 before Honorable Staley, Circuit Judge, Marsh & Miller, District Judges, filed.

Aug. 13 Plaintiff's motion for Permanent Injunction and supporting affidavit filed Aug. 9, 1957, with acceptance of service thereon.

Aug. 13 Defendant's Petition to dissolve Temporary Restraining Order and to Dismiss Complaint filed Aug. 9, 1957, affidavit attached.

[fol. 4]

Aug. 19 Notice of defendants' petition to dissolve Temporary Restraining Order and to dismiss Complaint, filed.

Aug. 20 Answer to Petition to Dissolve Temporary Restraining Order and to Dismiss Complaint filed Aug. 9, 1957, filed. Acceptance of service of copy thereon.

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Sept. 26 Stipulation of counsel in re Affidavits of Donald McNeil and Joseph Barnett, filed together with proposed Orddr (sic) of Court.

Sept. 30 On Stipulation filed Sept. 26, 1957, Order entered directing that the same be approved and filed, and the affidavits of Donald McNeil and Joseph Barnett, heretofore filed in support of defendant's Motion for Summary Judgment are hereby admitted to the record as depositions. Marsh, D.J.

Oct. 9 Amended Request for Findings of Fact and Conclusions of Law filed by counsel for plaintiff Oct. 8, 1957.

Oct. 9 Memorandum in support of defendants' petition to dissolve Temporary Restraining Order and to Dismiss Complaint filed Oct. 8, 1957 by counsel for defendants.

Oct. 14 Order entered Oct. 11, 1957 directing the caption and record herein be amended by adding as defendant, Lewis M. Stevens, Successor to Joseph Lawler, as Secretary of Highways of the Commonwealth of Pennsylvania. Marsh, D.J.

Nov. 18 Hearing on Arguments begun before Jusges (sic) Staley, Miller and Marsh.

Nov. 18 Hearing concluded C. A. V.

Nov. 18 Hearing memo filed. (Rep. Ruby Palmer)

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Mar. 19 Order entered directing that defendants Lewis M. Stevens, Sec'y of Highways of the Commonwealth of Pennsylvania and George M. Leader, Governor of the Commonwealth of Pennsylvania are permanently enjoined from enforcing or otherwise complying with the Penna. "Limited Access Highways Act" 1945 May 29, P. L. 1108 Par. 1 et seq., as amended 36 Purdon's Pa. Stat. ann. Par. 2391.1 et seq. so as to interfere with

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or deprive the plaintiffs of their right of ingress or egress to, from or across the "Airport Parkway" in Allegheny County, Pa., Austin L. Staley, Circuit Judge, John L. Miller, District Judge.

May 12 Notice of Appeal to the Supreme Court of the United States filed by defendant.

May 12 Letters sent to counsel and to Judges.

July 3 Record on Appeal mailed to the Clerk of the Supreme Court of the United States at Washington, D. C., and letters mailed to counsel and Court.

[fol. 5]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 13672 (Equitable Relief)

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Plaintiffs,

v.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

COMPLAINT—Filed August 1, 1955

1. Plaintiffs herein are: J. K. Creasy, William W. McNamee, Frank Ranallo, A. W. Tuiccillo, Ed Kleeman, R. G. Cummiskey. Plaintiffs are residents of said District and bring this action on behalf of themselves and other property owners and tenants of real property abutting The Airport Parkway as further defined herein. There are 50 or more other persons who are property owners or tenants on

property which abutts the said Airport Parkway. For the purpose of this action, the five miles of public highway extending from the intersection of Routes 22 and 30 to the Greater Pittsburgh Airport is termed the "Airport Parkway." The question to be determined herein is one of common and general interest to each of them, for which reason Plaintiffs herein sue for all such persons in like situation with themselves, pursuant to Rule 23 a of the Federal Rules of Civil Procedure. The said Airport Parkway has been in operation for about five years. At the present time, it is the principal thoroughfare for travel between the City of [fol. 6] Pittsburgh and the Greater Pittsburgh Airport, and many thousands of vehicles use it every day, and thus pass the respective properties of the Plaintiffs herein, which properties as aforesaid abutt said highway, so that for many purposes, the location of land immediately abutting on it presents an element of very considerable value. Some of the Plaintiffs have filling stations or other business establishments, in the operation of which immediate access to the highway is a valuable element; others of the Plaintiffs comtemplate (sic) improvements or (sic) like or other kinds on their respective properties, and with reference to which the immediate proximity of the highway would be of great value and importance.

2. (a) The Defendant, George M. Leader, is the Governor of the Commonwealth of Pennsylvania.

(b) The Defendant, Joseph Lawler, is Secretary of Highways of the Commonwealth of Pennsylvania. As such, he is in charge of supervision and maintenance of the highways of the Commonwealth of Pennsylvania.

(c) The County of Allegheny is a municipal sub-division of the Commonwealth of Pennsylvania.

(d) This court has jurisdiction of this action for the reason that it arises under the Constitution of the United States and particularly under Article 1, Section 10 of the Constitution, and the 14th amendment. This action involves more than the sum of $3,000.00, exclusive of interest and costs.

[fol. 7] 3. At the time of the building of the said highway by the County of Allegheny, for the purposes of the highway, the county of Allegheny condemned by eminent domain the necessary quantities of land including, in some instances, land taken from the aforesaid properties of some of the Plaintiffs herein. In making allowance for the damages to which the said persons would be entitled, by reason of said taking, it was the contention of the County of Allegheny —and in accordance with standard practice in Pennsylvania —that the damages should be diminished to the extent of the benefits which the property owner would obtain by reason of having frontage on a new highway, and direct ingress and egress thereto and therefrom. Therefore, all or a great part of the land necessary for the building of said highway was purchased, or seised, and paid for on the basis of future benefits by reason of said abutting on said highway, and said ingress and egress.

4. By statute of 1945, amended in 1947 (36 P. S. 2391), the Commonwealth of Pennsylvania has undertaken to permit what is known as Limited Access Highways. Said statute provides, inter alia, as follows:

> "(a) The Secretary of Highways, with the approval of the Governor, is hereby authorized to declare any State highway route, or part thereof, now or hereafter established, to be a limited access highway.
>
> (b) Whenever the establishment of a limited access highway will facilitate the movement of traffic the Secretary of Highways, with the approval of the Governor, is hereby authorized to lay out new highways, [fol. 8] take over existing highways, or parts thereof, and declare the same to be a limited access highway to be constructed and maintained as a State highway."

The said statute further provides as follows:

> "The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of

any political sub-division of the Commonwealth, which assumes such responsibility by proper resolution or ordinance."

Pursuant to the provisions of the said statute, which on its face attempts to authorize the Secretary of Highways to do so, with the approval of the Governor, the said Defendants (as the Plaintiffs are informed and believe) are about to take over the aforesaid Airport Parkway, and establish it as a "Limited Access Highway", and by establishing physical barriers or otherwise, to prevent the Plaintiffs from entering said highway from their respective properties, and to deprive the Plaintiffs respectively of the right of ingress and egress to and from said highway.

5. Said action of said Defendants will be in violation of the aforesaid provisions of the Constitution of the United States, in that it would deprive the Plaintiffs of their property without due process of law, and will deny to them, respectively, the equal protection of the laws of Pennsylvania.

6. The said statute forbids the payment of consequential damages to abutting owners where a Limited Access High- [fol. 9] way is declared. The Plaintiffs are informed, believe and therefore aver that said Defendants intend to pay nothing to the members of the Plaintiff class. So far as Plaintiffs can learn, from investigation, this is the first, or at least, a very unusual attempt by the officials of Pennsylvania to make use of the said statute. In the principal Limited Access Highway in Pennsylvania, to-wit: the Turnpike, abutting property owners, are permitted by law to receive consequential damages, as Plaintiffs are advised and believe. Thus, the aforesaid unconstitutional statute of 1945, as amended, is discriminatory and confiscatory and in contravention to the provisions of the Constitution of the United States aforesaid; said action of the Defendants will deprive the Plaintiffs and the other members of their class of their property without due process of law, contrary to the provisions of the Constitution as aforesaid. This has been particularly aggravated here because the Governor and the Secretary of Highways, under this Act, thus can do what the present owners of said highways, to-wit: the County of

Allegheny, could not do. Thus, the said Defendants are attempting to accomplish, under the unconstitutional statute aforesaid, what their municipal sub-division, the County of Allegheny, could not accomplish itself.

7. Unless restrained and enjoined, the said Defendants will proceed with their contemplated action, and will, as aforesaid, take away from the members of the Plaintiff class, their direct ingress and egress to and from said highway and otherwise will proceed to the detriment and [fol. 10] loss of the Plaintiffs, as hereinabove averred, and said action, in the circumstances, would also present an impairment of the obligation of contract presented by the circumstances hereinabove set forth, and thus, in violation of the principles of the Constitution of the United States as aforesaid. The precise estimate of the damages, which will result to the Plaintiffs would be difficult, and the Plaintiffs will suffer irreparable injury, unless the Acts ought to be restrained promptly. A remedy at law would not be adequate.

8. It is specifically averred that immediate irreparable damage will be caused to the Plaintiffs by reason of the aforesaid contemplated action of the said Defendants, unless their said action be restrained at once; such restraining order should be entered pending the hearing of the application for an interlocutory injunction.

9. Plaintiffs are advised that this action should be heard by a three-Judge Court—28 USC 2281 et seq.

Wherefore, Plaintiffs are in need of equitable relief and demand judgment as follows:

1. That it be ordered, adjudged and decreed that the aforesaid Pennsylvania statute of 1945, as amended in 1947, is in contravention and violation of the Constitution of the United States and the 14th amendment thereto.

2. That the said defendants, and each of them, be temporarily restrained and then enjoined from declaring the [fol. 11] said highway to be a "Limited Access Highway", and from interfering with direct ingress and egress to and from Plaintiffs property and said highway.

3. That the said Defendants be restrained and enjoined from enforcing the aforesaid Pennsylvania statute with reference to the said highway.

4. That the Plaintiffs be given general relief.

A. E. Kountz, William A. Meyer & Edward P. Good,
Kountz, Fry & Meyer, Attorneys for Plaintiffs

Duly sworn to by J. K. Creasy, et al. jurat omitted in printing.

[fol. 11a] [File endorsement omitted]

[fol. 12]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—
Filed August 1, 1955

The Plaintiffs herein move for a Temporary Restraining Order pursuant to the averments in the Bill of Complaint, and in the Affidavit filed.

A. E. Kountz, William A. Meyer & Edward P. Good,
Kountz, Fry & Meyer.

TEMPORARY RESTRAINING ORDER

This cause came to be heard upon the motion of the Plaintiffs in the above-entitled case, for an interlocutory injunction against the Defendants, namely, Joseph Lawler, Secretary Highways of the Commonwealth of Pennsylvania and George M. Leader, Governor of the Commonwealth of [fol. 13] Pennsylvania, and it appearing to the Court that said Complaint seeks an interlocutory judgment against the Defendants, restraining and enjoining the Defendants from declaring the public highway of approximately five miles in length, extending from the intersection of Routes 22 and 30 to the Greater Pittsburgh Airport, and referred to in the Complaint as "The Airport Parkway" situate in Allegheny County in said district to be a "Limited Access Highway",

and restraining and enjoining said Defendants from interfering with direct ingress and regress (sic) to and from Plaintiffs property and said highway, and enjoining said Defendants from enforcing with reference to said highway the Pennsylvania statute of 1945, as amended in 1947, appearing in 36 P. S. 2391 et seq. which attempts to provide for a Limited Access Highway, upon the ground of the unconstitutionality of said Act or statute as provided by Section 2281 of Title 28 of the United States Code, and it further appearing that immediate and irreparable damage will be caused to the Plaintiffs unless a temporary restraining order is issued ex parte and without notice against said Defendants until the hearing of said application for an interlocutory injunction, it is ordered that said Defendants, Joseph Lawler, Secretary of Highways of the Commonwealth of Pennsylvania and George M. Leader, Governor of the Commonwealth of Pennsylvania, be and hereby are enjoined from enforcing with reference to said highway the Pennsylvania statute of 1945, as amended in 1947, appearing in 36 P. S. 2391 et seq. which attempts to provide for a Limited Access Highway, until the hearing on said application for an interlocutory injunction.

Dated August 1, 1955.

Rabe F. Marsh, United States District Judge.

[fol. 13a] [File endorsement omitted]

[fol. 14]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

ANSWER—Filed August 26, 1955

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

1. The averments of fact set forth in paragraph 1 of the complaint are admitted, subject to the qualification that

every grant of land with the Commonwealth of Pennsylvania, from the time of the original proprietaries, has contained an express reservation to the Commonwealth of six (6%) percent of the land for roads, by reason whereof Plaintiffs' title to the property referred to in the complaint is subordinate to the title of the Commonwealth therein.

[fol. 15] 2. (a) Admitted.

(b) Admitted.

(c) Admitted.

(d) Admitted, subject to the defense that the complaint fails to set forth a cause of action under the Constitution of the United States.

3. The averments of fact set forth in paragraph 3 of the complaint are admitted, subject to the qualification that, in the assessment of said damages, due consideration and weight were given to the effect that the statute cited in paragraph 4 of the complaint has upon Plaintiffs, said statute being then in full force and effect.

4. The first three sentences of paragraph 4 of the complaint are admitted.

The fourth sentence of paragraph 4 of the complaint is denied in its entirety. Although Defendants have been discussing with the proper officials of the County of Allegheny the advisability and feasibility of the Commonwealth's taking over the said highway and establishing it as a "Limited Access Highway," no decision with respect thereto has yet been reached. It is denied that physical barriers are about to be established along said highway; it is alleged, to the contrary, that it is not contemplated that such barriers will be erected even should said highway be declared a "Limited Access Highway." It is denied that Plaintiffs will be deprived of the right of ingress and egress to and from said highway in the event said highway is declared a "Limited Access Highway," for the reason that Plaintiffs will nevertheless have means of ingress and egress by reason of one of the following: (a) the Secretary of Highways has authority to determine the location of points of ingress and [fol. 16] egress to and from said highway, and thus has authority to allow direct ingress and egress to and from

Plaintiffs' properties; (b) the Secretary of Highways has authority to establish local service roads, which afford property owners and tenants adjacent to the limited access highway a means of ingress and egress to and from a highway connecting with the limited access highway; and (c) in the absence of other means of ingress and egress, the property owners affected, under Pennsylvania law, have a right of way of necessity over neighboring lands.

5. Denied.

6. The averment of the first sentence of paragraph 6 of the complaint is admitted, subject to the qualification that the said provision of the said statute is merely declaratory of prior law.

The averment of the second sentence of paragraph 6 of the complaint is admitted, subject to the qualification that, if there should be a taking of property by the Commonwealth under its power of eminent domain, damages will be paid to the members of the Plaintiff class.

The averment of the third sentence of paragraph 6 of the complaint is denied.

The averment of the fourth sentence of paragraph 6 of the complaint is admitted, subject to the qualification that, in the case of the Turnpike, abutting property owners are entitled to receive consequential damages because of an actual taking of property by the Pennsylvania Turnpike Commission.

The averments of the fifth, sixth and seventh sentences of paragraph 6 of the complaint are denied.

7. Denied in its entirety. Defendants allege that Plaintiffs have an adequate remedy at law, since the statutes of [fol. 17] the Commonwealth of Pennsylvania afford property owners the right to petition the Court of Common Pleas for the appointment of viewers; in such a proceeding the liability of the Commonwealth for consequential damages and the rights of Plaintiffs to recover the same may be legally tested.

8. Denied.

9. Admitted.

Wherefore, Defendants demand that Plaintiffs' complaint be dismissed at the costs of Plaintiffs.

/s/ Leonard M. Mendelson, Attorney for Defendants,
2330 Grant Building, Pittsburgh 19, Pennsylvania.

[fol. 17a] [File endorsement omitted]

[fol. 18]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—Filed August 26, 1955

Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judgment for the Defendants on the ground that, as appears from the pleadings, Defendants are entitled to judgment as a matter of law.

Dated: August 26, 1955

/s/ Leonard M. Mendelson, Attorney for Defendants,
2330 Grant Building, Pittsburgh 19, Pennsylvania.

[fol. 18a] [File endorsement omitted]

[fol. 19]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

AMENDMENT TO COMPLAINT—Filed September 2, 1955

The Plaintiffs herein named, by their undersigned attorneys, move to amend their Complaint heretofore filed in the following manner:

I. By striking therefrom Paragraph 4 thereof, and inserting in lieu thereof the following:

4. (1) By statute of 1945, amended in 1947 (36 P. S. 2391), the Commonwealth of Pennsylvania has undertaken to permit what are known as Limited Access Highways. A limited access highway is defined in the said statute as "a public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor." Said statute provides, inter alia, as follows:

[fol. 20] "(a) The Secretary of Highways, with the approval of the Governor, is hereby authorized to declare any State highway route, or part thereof, now or hereafter established, to be a limited access highway.

(b) Whenever the establishment of a limited access highway will facilitate the movement of traffic the Secretary of Highways, with the approval of the Governor, is hereby authorized to lay out new highways, take over existing highways, or parts thereof, and declare the same to be a limited access highway to be constructed and maintained as a State highway."

The said statute further provides as follows:

"The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political sub-division of the Commonwealth, which assumes such responsibility by proper resolution or ordinance."

(2) During August of 1955, the exact date being unknown to the Plaintiffs, but well known to Defendants, Defendant Secretary of Highways, or his assistants caused or permitted an announcement to be made of "plans to take over" the said highway and "convert it into a limited access highway just like the Penn-Lincoln Parkway." This said announcement was made, possibly in several ways, but particularly as follows: The Pittsburgh Automobilist is a magazine published in Harrisburg, Pennsylvania, by the Pennsylvania Motor Club Publications, and in August of [fol. 21] 1955, its issue for that month contained the follow-

ing announcement of plans of the said Defendant, Secretary, by an article including the following:

"STATE TAKES OVER AIRPORT PARKWAY TO LIMIT ACCESS

The State Highways Department has announced plans to take over the Airport Parkway and convert it into a limited-access highway just like the Penn-Lincoln Parkway.

The Airport Parkway was built by the County and is virtually the same road as the Penn-Lincoln Parkway built by the State.

However, the State section of the Parkway has been a controlled-access freeway from the start with entrances and exits only at specially constructed interchanges."

The Plaintiffs, despite their efforts, have not been able to obtain, to date, any official statement with regard to the plans of said Defendant; such statements, however, apparently have gone out to non-interested people, as illustrated by the magazine article aforesaid. In other words, the members of Plaintiff class, who are most vitally concerned, and who should have been consulted about the aforesaid matter, have heard nothing officially, and have not been so fortunate as to receive direct information such as evidently was given to the magazine aforesaid, by the Defendants.

Therefore, and in the absence of any forthright disclosure from Defendants with regard to their precise plans, the Plaintiffs, on information received as aforesaid, now aver that it is the intention of said Defendants, as expressed in the magazine article quoted above, to "freeze further roadside development" along said highway, and to provide for [fol. 22] entrances and exits only at specially constructed interchanges, so that no one using said highway could have direct access into or from the lands of the members of the Plaintiff class; all of which will result, as to the improved properties of some of the members of the Plaintiff class, as well as unimproved properties of the other members thereof, in loss in valuation or in good will, business and

trade, or both, amounting to an enormous sum of money in total, and much in excess of one million dollars.

(3) The Plaintiffs, not having been favored with precise information of the "plans" of the Defendants in this regard, from their knowledge of the other highway mentioned in the aforesaid newspaper article and other evidence, believe and now aver that it is the intention of the Defendants to effect the non-access or limited access feature, as to the Plaintiffs' properties, by fences, barriers, grading, curbing or otherwise.

II. By striking therefrom Paragraph 5 thereof, and inserting in lieu thereof the following:

5. Said action of said Defendants will be in violation of the 14th Amendment of the Constitution of the United States, in that it will deprive Plaintiffs of their property without due process of law, and will deny to them the equal protection of the laws of Pennsylvania. Even if the statutes herein referred to were constitutional, the unjustifiable, unconscionable and deceitful abuse thereof as herein set forth should be prevented, restrained and enjoined as a violation of the aforesaid amendment to the Constitution of [fol. 23] the United States. Plaintiffs further contend that said abuse is in particular a denial of the equal protection of the law to Plaintiffs in view of the provisions of Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania, which provides that private property shall not be taken or applied to public use without authority of law, and without just compensation.

A. E. Kountz, William A. Meyer, Kountz, Fry & Meyer, Attorneys for Plaintiffs.

Waiver

The Defendants, by their undersigned attorney, waive notice of the filing and presentation of the foregoing Amendment and do not object to the entry of an Order permitting the filing thereof and granting the Defendants 20 days to answer.

/s/ Leonard M. Mendelson, Attorney for Defendants.

Order

The foregoing Amendment is permitted to be filed this 2nd day of September, 1955; Defendant is directed to answer it within 20 days from the date hereof.

/s/ John L. Miller, D.J.

[fol. 23a] [File endorsement omitted]

[fol. 24]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

ANSWER TO AMENDMENT TO COMPLAINT—
Filed September 7, 1955

First Defense

The complaint as amended fails to state a claim upon which relief can be granted.

Second Defense

Defendants admit the portion of the amendment to complaint which refers to and quotes the statute of 1945, amended in 1947 (36 P. S. 2391), and deny each and every other allegation contained in the amendment to complaint.

Wherefore, Defendants demand that Plaintiffs' amendment to complaint be dismissed at the cost of Plaintiffs.

/s/ Leonard M. Mendelson, Attorney for Defendants, 2330 Grant Building, Pittsburgh 19, Pennsylvania.

[fol. 24a] Acknowledgment of service (omitted in printing).

[File endorsement omitted]

[fol. 25]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

MOTION TO AMEND MOTION FOR SUMMARY JUDGMENT—Filed November 16, 1955

Defendants, by their attorney, Leonard M. Mendelson respectfully move that their motion for summary judgment heretofore filed, dated August 26, 1955, be amended so as to include the affidavit attached hereto and that the motion for summary judgment be deemed amended so as to read as follows:

"Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judgment for the Defendants on the ground that, as appears from the pleadings and affidavit, Defendants are entitled to judgment as a matter of law."

/s/ Leonard M. Mendelson, Attorney for Defendants.

Consented to: Kountz, Fry & Meyer, by Edward P. Good, Attorneys for Plaintiffs.

[fol. 26]

AFFIDAVIT OF JOSEPH BARNETT

District of Columbia, *ss.*:

Before Me, the undersigned authority, personally appeared Joseph Barnett, who, being duly sworn according to law, deposes and says that:

1. He is Assistant Deputy Commissioner, United States Department of Commerce, Bureau of Public Roads, Division of Engineering. He is not connected with the Commonwealth of Pennsylvania nor any of its subdivisions and devotes his entire time and receives his entire salary from the United States.

2. He is a graduate in Civil Engineering from the Cooper Institute of Technology with the degree of Bachelor of

Science in Civil Engineering and later received his Degree of Civil Engineer from the same Institute. He is licensed to practice professional engineering in the State of New York and the District of Columbia.

3. After several years of work for engineering concerns in the design and construction of buildings, bridges, and structures, he joined the staff of the Westchester County Park Commission in New York in 1925 and for the next eight years assisted in the pioneer development of parkways and expressways which established a pattern for such facilities in metropolitan areas. He has been an engineer with the Bureau of Public Roads since December 1933. He was in charge of the design of some outstanding expressway projects, including a portion of the George Washington Memorial Parkway and the Pentagon Road Network in Virginia. In 1944 he was made Chief of the newly organized Urban Highway Branch, in which capacity he advised States and cities in their planning, development, and design of arterial highway routes. As Secretary of the Committee on Planning and Design Policies of the American Association of State Highway Officials he has developed design policies and standards adopted by that Association. He has been Assistant Deputy Commissioner since September 1953, in charge of five branches in the Division of Engineering.

[fol. 27] 4. He believes that arterial highways best serve the needs of the traveling public and the economy of this country when they are designed in such manner as to enable traffic to flow without interruption, to maintain the capacity to handle traffic, and to minimize the hazards of travel. He has concluded that these objectives can be realized to the maximum degree where the highway is designed with full control of access, sometimes referred to as limited access. He believes that most communities are familiar with and have examples of arterial highways which were designed and constructed in the best possible manner except that access was not controlled and which after being opened to traffic steadily lost their capacity to accommodate traffic and became inadequate not because of increased traffic volume but because of interference from uncontrolled roadsides, with roadside businesses vying with one another for the attention and patronage of travelers. This is par-

ticularly noticeable in urban and suburban areas where this lack of access control soon results in traffic congestion, reduction of highway capacity, and increase in accident experience.

5. He has concluded that one of the principal advantages of a controlled access highway is its ability to accommodate a much greater volume of traffic than one without such access control. In urban and suburban areas a highway with full control of access can accommodate 1500 to 2000 vehicles per lane per hour, depending upon the physical characteristics of the highway and the percentage of trucks, whereas the same highway without access control and with roadside businesses developing alongside has a capacity from 300 to 1000 vehicles per lane per hour, depending also on the physical characteristics of the highway and the percentage of trucks but depending even to a greater degree on the interference from the roadsides and the frequency of crossings at grade which inevitably delay traffic to such an extent that traffic light control ultimately becomes necessary.

6. In his opinion, there is a sufficient mileage of controlled access highways now in operation, and sufficient data regarding those controlled access highways, to provide, with respect to accident rate, a reliable comparison with uncontrolled access highways. Attached hereto and [fol. 28] made part hereof is Circular Memorandum No. F-2.22 of the United States Department of Commerce, Bureau of Public Roads, dated April 25, 1955, entitled "Accident Experience on Controlled Access Highways," to which memorandum are attached tables setting forth the accident rates on typical highways with full control of access, typical highways with partial control of access, and typical highways with no control of access. The attached Circular which he believes to be accurate points to the conclusion that control of access results in substantial reduction of traffic accidents. Deponent, on the basis of this and similar studies, believes that the accident and mortality rate of the controlled access highway is less than one-half that experienced on the uncontrolled access highway.

7. Deponent has computed the cost of accidents on the basis of costs and accident statistics of the National Safety Council, which he believes to be accurate, and has estimated that the cost of accidents in the United States is about 0.8 cent per vehicle mile of travel. Since controlled access highways have less than one-half the death and accident rate of the national average, it may be conservatively estimated that the savings due to accident reduction likely to be realized by full control of highway access is 0.4 cent per vehicle-mile of travel.

8. He believes that experience has demonstrated that the controlled access highway, by facilitating the flow of traffic, will save a vast amount of man-hours of time. Furthermore, the controlled access highway, by eliminating stops and delays, reduces the operating cost of vehicles.

9. Deponent believes that long-range economy is a distinct benefit of the controlled access highway, since a highway without access control loses its ability to handle the amount of traffic for which it was designed when roadside businesses develop along it, and a new highway becomes necessary to relieve congestion and accommodate the design traffic volume. Highways subject to access control may be reasonably expected, with proper maintenance and occasional resurfacing, to retain their full traffic capacity.

10. Deponent believes he has accurately reflected the consensus of highway engineers in the views herein expressed; moreover, he believes that the rapid increase [fol. 29] in creation and utilization of controlled access highways is a manifestation of the efforts which the highway engineers have exerted toward obtaining acceptance of the principle. Deponent further believes that the traveling public favors the ease of driving, the saving of time, the saving in cost of vehicle operation, and the reduction in accidents experienced on controlled access highways and their willingness to pay for such savings and values is reflected by the widespread and increasing use of toll roads which are highways with full control of access.

11. In conclusion, deponent believes that it may be fairly said that the controlled access highway has become an

indispensable feature of any arterial highway designed to accommodate a large volume of traffic. Particularly would this be true of a highway which serves as the principal means of vehicular communication between a large metropolitan area like Pittsburgh and its airport.

/s/ Joseph Barnett

Sworn to and subscribed before me this 10th day of November, 1955.

/s/ Mary A. Beall, Notary Public.

(Seal)

[fol. 30]

ATTACHMENT TO AFFIDAVIT

DEPARTMENT OF COMMERCE
BUREAU OF PUBLIC ROADS
Washington 25, D. C.

F-2.22 April 25, 1955

CIRCULAR MEMORANDUM TO: Division Engineers

FROM: E. H. Holmes, Acting Deputy Commissioner

SUBJECT: Accident Experience on Controlled Access Highways

Data on the relation of access control to accident frequency, compiled during the last few years with the cooperation of a number of the State highway departments, indicate that superior safety is a remarkably consistent benefit of controlled access highways. The attached tabulations contain the accident records of facilities with full, partial, and no control of access. The experience in 19 States and the District of Columbia is presented. More than 2,000 miles of streets and highways have been classified as to their access control characteristics, and the gross records include over 36½ billion vehicle-miles of travel, and approximately 108,000 accidents, in which more than 2,500 persons were killed. Combining the entire mileage

thus far embraced by the study, we find the general rates indicated below:

Control of access	Number per 100 million vehicle-miles	
	Fatalities	Accidents
Full	2.8	171
Partial	9.6	240
None	8.0	408

Despite the subsequent addition of a considerable increment of mileage and accident experience, these rates do not differ greatly from those shown in the summaries distributed with our memorandum of October 12, 1953, on the same subject. Now, as then, it is pointed out that the substantial amount of California and Connecticut experience included makes the reported rates only approximately typical of the actual that might be obtained if data were available for all highways of these types. In this connection, the high fatality rate and intermediate accident rate for highways with partial control of access will be noted.

[fol. 31] The reported accident experience differs rather widely between rural and urban conditions as might be expected. The rates for facilities in these areas and in localities that are partly urban and partly rural are shown in the following table:

Degree of access control	Length (miles)	Vehicle-miles (1000's)	Number of		Number per 100 million vehicle-miles	
			fatalities	accidents	fatalities	accidents
RURAL AREAS						
Full	297.09	5,520,204	175	10,316	3.2	187
Partial	805.15	9,161,041	898	19,797	9.8	216
None	698.80	11,510,739	993	42,661	8.6	371
URBAN AREAS						
Full	136.53	4,991,800	115	7,696	2.3	154
Partial	34.60	520,040	30	3,236	5.8	622
None	50.24	879,047	36	6,601	4.1	751
PARTLY RURAL, PARTLY URBAN AREAS						
Full	NO	DATA		AVAILABLE		
Partial	9.40	76,264	6	421	7.9	522
None	149.38	3,876,402	274	17,094	7.1	441

Analysis of other factors involving access control and accident frequency is proceeding, using the data supplied on the PR-761 forms received since the October 1953 summary was issued. Certain relations involving accident severity, manner of collision, traffic volume, and design elements with the varying degrees of access control will be defined as additional comparative records become available for study. From the work thus far, it is clear that facilities with full control of access have an unusual accident problem in that rear end collisions are involved in well over half the accidents. Another preliminary finding that deserves mention concerns the severity rate, i.e., the number of deaths per 100 accidents. On rural highways with partial control of access, the severity rate is substantially higher than under any other conditions.

[fol. 32] The overall safety benefits of access control are plainly evident from the information already assembled. These benefits cannot be fully evaluated, however, without much more data than are currently available. With this objective in mind, it is requested that the Division Engineers ask all States to collect and supply the Washington office with records on comparable sections in both rural and urban areas where differences in access control characteristics exist. Data should be reported on our PR-761 form. It will be particularly helpful to have additional accident data for sections on which PR-761's have been completed previously, and for any other controlled access highways that have been in service for at least a year. Instructional notes have been prepared to aid in the preparation of the PR-761 and a supply of these and of the forms are being sent to each Division office.

Summaries will be prepared periodically so that the results may be of maximum benefit to the cooperating States.

Attachments

P 31 (SHEET 1)

Table 1.--Accident experience: Highways with full control of access

State	Route	Type of area 1/	Length Miles	Period	Average daily traffic	Vehicle-miles Thousands	Number of Fatalities	Number of Accidents	Rate 2/ of Fatalities	Rate 2/ of Accidents
Calif.	14 Route Sections	R	40.25	1949-1953	24,880	639,643	17	826	2.7	129
Calif.	Indiana St. to Las Vegas St., Los Angeles (VII-LA-2-LA)	U	3.01	1/1/52-6/30/54	46,253	127,000	1	208	0.8	164
Calif.	So. San F. to No. of Burlingame (S. M. 68 - SSF, -F, - Millbrae)	U	5.08	1/1/52-6/30/53	47,200	131,280	3	144	2.3	110
Calif.	Ramona Freeway	U	3.65	1948, '49, '51-'53	39,500	205,440	8	301	3.9	147
Calif.	Hollywood Freeway (Highland to Vineland)	U	2.94	1948, '49, '51-'53	83,200	403,170	11	610	2.7	151
Calif.	Hollywood Freeway (4-level to Cahuenga)	U	5.51	2/51-53	78,800	388,370	7	449	1.8	116
Calif.	Arroyo Seco (Route 205 to Pasadena)	U	6.12	1941-49, '51-'53	32,000	705,000	12	927	1.7	131
Calif.	Arroyo Seco (Route 165 to Los Angeles	U	2.03	1948, '49, '51-'53	79,850	246,290	8	369	3.2	150
Calif.	Santa Ana Freeway (Buhman to 4-level structure)	U	11.55	1951-1953	45,380	337,160	3	456	0.9	135
Calif.	Carlsbad-Oceanside Freeway (San Marcos Creek to Las Encinas)	U	2.40	1953	12,630	11,070	0	35	0.0	316
Calif.	Cabrillo Freeway	U	4.70	5/48-4/49, '51 '53	24,700	161,710	4	315	2.5	195
Calif.	North Sacramento Freeway (Route 3)	U	4.24	1948, '49, '51-'53	24,500	189,680	5	306	2.6	161
Calif.	Bayshore Freeway (So. San Francisco to San Mateo)	U	8.48	1948, '49, '51-'53	82,785	586,060	13	625	2.2	107
Calif.	Bayshore Freeway (Army St. to Augusta St.)	U	1.30	1952-1953	54,000	47,190	3	116	6.4	245
Calif.	Presidio Freeway (San Francisco)	U	1.44	1951-1953	24,200	38,290	0	78	0.0	204
Calif.	Eastshore Freeway (Fallon St., Oakland, to Jackson St.)	U	14.57	1951-1953	43,200	453,770	17	672	3.7	148
Calif.	San Rafael Freeway (US 101)	U	1.63	1951-1953	18,540	33,090	0	33	0.0	100
Calif.	Montgomery Freeway	U	5.81	1952-1953	18,200	66,620	2	117	3.0	176
Calif.	Pittsburg-Antioch Freeway	U	5.30	1953	7,230	7,970	0	7	0.0	88
Calif.	All California Urban Full Control	U	3/89.76	1941-49, '51-'53	41,650	4,139,160	97	5,768	2.3	139
Conn.	Merritt Parkway (N.Y. State Line to Stratford)	R	37.46	1940-52	15,000	2,671,000	100	6,473	3.7	240
Conn.	Wilbur Cross Parkway (Milford to US 5 N. of Meriden)	R	29.47	1946-52	15,000	824,000	11	1,458	1.3	180
Conn.	South Meadows Expressway (Wethersfield to US 5A, Hartford)	U	3.84	1946-52	22,000	207,200	0	441	0.0	210
Conn.	Charter Oak Bridge and Toll Plaza, Hartford	U	1.04	1946-52	28,000	74,700	0	334	0.0	450
Conn.	Wilbur Cross Highway (East Hartford to Vernon)	R	9.20	1946-52	17,000	233,000	2	359	0.9	150
Conn.	Riverfront Boulevard, US 5A & Conn. 9, Hartford (including ramps to Charter Oak Bridge)	U	0.89	1946-52	26,000	58,300	5	162	8.6	280
Conn.	Veterans' Highway, US 5A (Hartford to Windsor)	U	2.71	1951-52	13,000	26,000	2	24	7.7	90
Conn.	Commodore Hull Bridge & approaches, Derby	U	1.20	1952	6,600	2,900	0	9	0.0	310
D. C.	Whitehurst Freeway	U	0.76	1950-53	28,150	31,204	0	23	0.0	74
D. C.	South Capitol Street	U	2.14	1950-53	25,460	79,411	2	113	2.5	142
D. C.	Canal Road	U	1.59	1950-53	5,220	12,106	0	32	0.0	264
D. C.	Dalecarlia Parkway	U	0.95	1950-53	3,125	4,325	0	2	0.0	46
Ga.	North-South Expressway in Atlanta (Hunnicutt St., NW to Peachtree Street, NE)	U	2.93	1952-53	21,500	45,943	2	50	4.4	109
Ga.	North-South Expressway in Atlanta (University Avenue to Fulton-Clayton County line)	U	5.23	10/52-12/52, '53	11,300	27,617	4	66	14.5	239
Md.	Baltimore-Washington Expressway	R	5.3	7/51-6/52	3,280	6,360	0	3	0.0	47
Mass.	Route 128, Wellesley (Rte. 9 to Wakefield-Lynnfield line-East boundary)	R	24.6	1952-53	20,060	360,206	9	235	2.5	65
Mass.	Route 6 (from Route 130 to Route 132, Barnstable)	R	9.5	1952-53	4,000	27,740	1	18	3.6	65
Mass.	Route 15 (from Route 20, Sturbridge, to Connecticut line)	R	6.7	1952-53	10,320	50,451	1	35	2.0	69
Mass.	New Route 2 from Concord west	R	11.06	1953	6,000	24,221	1	21	4.1	87
Mass.	New Route 138 between Raynham and Fall River	R	11.8	1953	3,900	16,797	1	8	5.9	48
Mich.	Michigan 112 - Detroit Industrial Expressway (Romulus to Melvindale)	R	12.25	1948-53	18,100	485,577	24	636	4.9	131
Mo.	Southwest Trafficway, Kansas City (14th St. to 26th St.)	U	1.16	12/50-7/52	30,000	20,000	0	17	0.0	85
Okla.	Turner Turnpike (Oklahoma City to Tulsa)	R	88.00	5/53-11/53	3,760	66,142	3	68	4.5	103
R. I.	Olneyville Bypass (Plainfield St. to Harris Avenue, US 6)	U	3.63	1953	7,410	9,817	0	37	0.0	377

Table 1.--Accident experience: Highways with full control of access (continued) P.31 (SHEET 2)

State	Route	Type of area 1/	Length Miles	Period	Average daily traffic	Vehicle-miles Thousands	Number of Fatalities	Number of Accidents	Rate 2/ of Fatalities	Rate 2/ of Accidents
Texas	Gulf Freeway in Houston	U	9.20	10/48-9/53	108,000	387,000	6		1.6	
Texas	US 75 in Houston (Scott St. to Woodridge)	U	3.88	1952	46,610	66,008	1	159	1.5	241
Texas	Central Expressway in Dallas (Live Oak St. to Webb Street)	U	3.00	1952	33,290	36,450	0	51	0.0	140
Texas	State 550 in Fort Worth (Camp Bowie Blvd. to Summit Avenue)	U	3.95	1952	21,530	31,041	0	59	0.0	190
Texas	US 81 in Fort Worth (Seminary Drive to E. Rosedale Avenue)	U	3.41	1952	9,400	11,700	0	31	0.0	265
Texas	US 87 Expressway in San Antonio (Woodlawn Ave. to Poplar St.)	U	1.44	1952	20,140	10,586	1	24	9.4	227
Va.	Shirley Highway, Section 1A, Fairfax County	R	11.50	9/49-12/52	10,740	115,067	5	176	4.3	153
Va.	Shirley Highway, Section 2A, Arlington	U	2.50	1951-52	31,450	57,389	1	145	1.7	253
Va.	US 1 (Abutments Twin Highway Bridges to Jct. with Shirley Highway - Arlington County	U	0.52	3/51-12/53	74,230	39,943	0	149	0.0	373
Total	.....	.....	433.62	.....	.....	10,512,004	290	18,012	2.8	171

1/ R = rural; U = urban

2/ Number per 100 million vehicle-miles

3/ Total mileage figure below does not include duplicated mileage introduced by this entry.

Table 2.--Accident experience: Highways with partial control of access

P. 31 (SHEET 3)

State	Route	Type of area 1/	Length Miles	Period	Average daily traffic	Vehicle-miles Thousands	Number of Fatalities	Number of Accidents	Rate 2/ of Fatalities	Rate 2/ of Accidents
Calif.	118 Route Sections	R	548.27	1949-1953	10,270	7,611,282	789	15,809	10.4	208
Calif.	Glutwieler St. to near Rosecrans Ave., Los Angeles (LA-174-B)	U	3.43	1/1/52-6/30/54	28,950	90,600	6	232	6.6	256
Calif.	Lerdo to 0.77 mi. north of Bakersfield C.L. (Kern 4G and 4D)	R	9.69	1952-1953	15,771	110,900	9	158	8.1	143
Colo.	West Sixth Ave. (FA12, US 6, SR 182; Sheridan Blvd. at N.C.L., Denver to Jct. US 6-40)	R	7.34	1951-1953	6,270	49,980	4	251	8.0	502
Colo.	East 46th Ave. and Vasquez Blvd. (Brighton Blvd. to Adams City)	U & R	4.03	1951-1953	14,700	63,720	6	387	9.4	607
Colo.	East C.L. Denver to Castle Rock (FA2,US 87,SR185)	R	21.10	1953	4,374	33,686	0	31	0	92
Conn.	Wilbur Cross Highway, Conn. 15 (Vernon to Mass. State Line)	R	24.75	1952	11,700	106,000	6	196	5.7	185
Conn.	US 1 (including Baldwin & Gold Star Bridges) Conn. 80, Old Saybrook to US 1A, Groton	R	17.54	1946-52	4,600	207,800	5	597	2.4	290
Conn.	Conn. 9, Middletown (0.7 mi. So. of Cromwell - Middletown T.L. to Main Street Extension)	U	1.26	1952	8,300	3,800	0	7	0	184
D. C.	New York Avenue	U	1.85	1950-53	21,500	58,098	2	263	3.4	453
Ga.	US 41 - Bartow Co. (Bartow-Cobb Co. line to 3.38 miles north)	R	3.38	1952-53	6,750	16,655	0	16	0	96
Ga.	US 41 - Cobb Co. (from SR 5 to Cobb-Bartow C.L.)	R	13.00	1952-53	6,050	57,467	2	103	3.5	179
Ga.	US 41 - Clayton Co. (Fulton-Clayton C.L. to 5.37 mi. South)	U & R	5.37	1953	6,400	12,544	0	34	0	271
La.	US 71 - Alexandria Bypass (Lee St. to Bolton Ave)	U	4.82	1950-52	4,730	24,964	0	80	0	320
Md.	US 40 (Pine Orchard to West Friendship)	R	5.4	7/51-6/52	5,190	10,255	0	12	0	117
Mass.	SR 128 (Lynnfield-Wakefield line to Danvers-Beverly line)	R	8.9	1952-53	10,000	65,086	2	178	3.1	273
Mass.	US 6 (Sagamore Bridge to SR 130)	R	3.5	1952-53	3,200	8,176	0	10	0	122
Mass.	SR 2 (between Leominster and Westminster)	R	8.8	1953	6,000	19,316	1	15	5.2	78
Minn.	T.H. 36, N. of St. Paul	R	7.8	1948-52	5,400	77,333	12	242	15.5	313
Minn.	T.H. 36, N. of St. Paul	U	7.8	1953	7,000	19,914	0	61	0.0	306
Minn.	T.H. 100, near Minneapolis	U	7.62	1948-53	12,700	212,096	16	1,315	7.5	620
Minn.	US 12 & 61 (Wilson Ave. to Hazelwood St., St. Paul)	U	1.68	1952-53	13,100	16,066	3	75	18.7	467
Ohio	US 40 (Clark County - Springfield to Vienna)	R	7.38	1951-52	7,600	41,000	1	93	2.4	227
Ohio	US 22 & SR 3 (Warren and Clinton Cos.-around Clarksville)	R	6.76	1951-52	3,050	14,800	5	23	33.8	155
Okla.	US 77 (Through Ardmore-Myall St., north to 12th Avenue)	U	2.00	7/52-7/53	5,494	4,011	0	26	0	648
Ore.	Sunset Highway, US 26 (Jct. Oregon 47 to Jct. Oregon 6)	R	22.03	1949-52	3,220	103,401	14	298	13.5	288
Ore.	Pacific Highway, US 99 (Azalea to Ox Yoke)	R	23.27	1949-52	2,760	93,489	10	203	10.7	217
Ore.	Pacific Highway East, US 99E (N. Jefferson Jct. to E. Albany Jct.)	R	10.57	1948-52	6,480	124,906	8	417	6.4	334
Ore.	Pacific Highway East, US 99E (Halsey to Harrisburg)	R	7.85	1946-52	3,990	80,020	9	130	11.3	163
Ore.	S.W. Harbor Drive (Portland)	U	2.14	1949-52	25,500	79,654	3	1,139	3.8	1430
R. I.	R. I. 146 - Louisquisset Pike (Park Ave., Woonsocket to north of Cobble Hill Road)	R	7.7	1953	7,600	21,355	1	33	4.7	155
S. D.	US 14-16 (East city limits of Rapid City, 7.314 miles east) - new route, opened 12/15/52	R	7.31	1953	8,540	22,799	1	52	4.4	228
Va.	US 58 (Norfolk to Virginia Beach)	R	4.01	1951	17,030	24,938	1	152	4.0	610
Wash.	US 10 (Seattle to Issaquah)	R	13.8	1949-52	9,270	186,772	9	557	4.8	298
Wash.	US 99 (Castle Rock to Kalama) New Route	U	15.0	1951-52	6,750	73,625	9	221	12.2	300
Wyo.	US 87 (2.5 miles east of Casper to 0.5 miles east of Casper)	U	2.0	1951-52	7,425	10,837	0	38	0.0	351
Total	.....	.....	841.35	.....	.....	9,757,345	934	23,454	9.6	240

1/ R = rural; U = urban.

2/ Number per 100 million vehicle-miles

3/ Total mileage figure below does not include duplicated mileage introduced by reclassification of this entry from "Rural" to "Urban."

P. 31 (SHEET 4)

Table 3.--Accident experience: Highways with no control of access

State	Route	Type of area 1/	Length Miles	Period	Average daily traffic	Vehicle-miles Thousands	Number of		Rate 2/ of	
							Fatalities	Accidents	Fatalities	Accidents
Calif.	Rural State Highways (4 or more lanes-Undivided)	R	179.00	1951-1953	21,030	4,304,486	328	16,322	7.6	379
Calif.	Rural State Highways (4 or more lanes-Divided)	R	247.00	1951-1953	14,970	4,222,446	381	14,156	9.0	335
Calif.	Redwood City to San Mateo (S.M. 68-C,-San Car.,-Belmont)	U	4.90	1/52-6/30/53	35,500	95,240	3	322	3.2	338
Calif.	South, from 1.07 mi. s. of Bakersfield C.L. (Kern 4-C)	R	10.56	1952-1953	14,332	110,500	32	429	29.0	388
Colo.	West Colfax Avenue (Sheridan Blvd. at W.C.L., Denver, to jct. US 6-40)	R	7.41	1951-1953	11,700	94,608	6	571	6.3	604
Colo.	Brighton Blvd. and Old Brighton Road (FAS 65, S.R. 265)	U & R	3.63	1951-1953	4,160	16,529	1	73	6.0	442
Colo.	Denver to Castle Rock (FA 2, US 85, SR 1)	U & R	21.90	1953	5,872	46,939	1	225	2.1	479
Conn.	Wilbur Cross Highway - Vernon to Mass. line	R	24.74	1946-51	5,800	314,470	26	773	8.3	246
Conn.	US 1 and 1A - N.Y. line to New Haven	U & R	42.70	1940-52	13,500	2,734,000	222	13,143	8.1	480
Conn.	Conn. 34 (Conn. 115, Derby to Conn. 122, West Haven)	U & R	6.92	1949-52	11,000	112,500	4	404	3.6	360
Conn.	Berlin Turnpike - Meriden to Wethersfield	R	11.06	1946-52	18,000	509,000	41	1,514	8.1	300
Conn.	Bulkeley Bridge and eastern approach US 44 (US 5A, Hartford to US 5, East Hartford)	U	1.25	1946-52	27,000	85,400	3	569	3.5	670
Conn.	US 5 (East Hartford to S. Windsor - E. Windsor T.L.)	U & R	6.86	1946-52	9,100	160,200	7	457	4.4	290
Conn.	Conn. 2 & US 5, East Hartford (0.71 mi. so. to 0.61 mi. no. of Conn. 15 & US 6)	U	1.32	1946-52	23,000	77,500	5	706	6.5	910
Conn.	US 5A, Windsor (Hartford-Windsor T.L. to Conn. 75, Windsor)	U	3.77	1946-52	12,500	120,900	6	711	5.0	590
Conn.	Conn. 8 (Conn. 127, Bridgeport to 1 mile so. of Derby T.L.)	U & R	8.08	1949-52	5,800	68,700	8	180	11.6	260
Conn.	US 1 (Quinnipiac River, New Haven to Conn. 80, Old Saybrook)	R	32.01	1946-52	6,900	563,000	46	1,811	8.2	320
Conn.	US 1 (US 1A, Groton to Rhode Island line)	R	14.56	1946-52	5,100	190,200	5	527	2.6	310
Conn.	US 6A, Portland (Conn. 17-A to east 0.83 mile)	U	0.83	1946-52	6,700	14,200	1	124	7.0	870
D. C.	M Street (29th to 36th Streets)	U	0.65	1950-53	18,900	18,006	0	176	0.0	977
D. C.	Nichols Avenue	U	2.11	1950-53	14,480	44,570	1	259	2.2	581
D. C.	MacArthur Blvd.	U	0.92	1950-53	6,930	9,335	0	32	0.0	343
Ga.	US 41-Fulton Co. (Northside Drive to Fulton-Cobb Co. line)	U	3.92	1952-53	14,750	42,211	2	107	4.7	253
Ga.	US 41-Cobb Co. (Fulton-Cobb Co. Line to SR 5)	U & R	10.19	1952-53	13,090	97,350	2	276	2.1	284
Ga.	West Bypass in Atlanta (Whitehall St., SW to 14th St., NW)	U	3.50	1952-53	22,250	56,849	1	237	1.8	417
La.	US 190-Baton Rouge Bypass (Florida St. to Scenic Hwy.)	U	6.70	1950-52	8,750	64,194	4	416	6.2	648
Md.	US 40 (Baltimore line to Pine Orchard)	U & R	9.4	7/51-6/52	11,220	38,599	2	130	5.2	337
Mass.	Route 9 (Brookline to Framingham-Southboro Line)	U & R	19.9	1952-53	26,160	372,753	15	1,246	4.0	334
Mass.	Route 1 (Malden to Peabody-Danvers line)	U & R	7.8	1952-53	17,900	101,606	3	397	3.0	391
Mass.	Route 28 (Falmouth to Route 132)	R	19.5	1952-53	4,490	63,925	9	61	14.1	95
Mich.	US 112 - Wayne County (Ypsilanti to Eloise)	R	9.84	1948-53	11,500	248,179	14	1,344	5.6	542
Minn.	Summit Avenue-St. Paul (Lexington Avenue to Cleveland Avenue)	U	2.02	1949-53	14,520	53,533	2	241	3.7	450
Minn.	Marshall Avenue-St. Paul (Lexington Avenue to Cleveland Avenue)	U	1.98	1949-53	15,880	57,346	4	475	7.0	828
Minn.	T.H. 100 and 5, south of Minneapolis	U & R	12.00	1948-52	5,800	127,226	9	563	7.1	443
Minn.	T.H. 100 and 5, south of Minneapolis	U	3/8.10	1953	9,300	28,966	0	149	0.0	514
Mo.	Broadway Street-Kansas City (14th Street to 26th Street)	U	1.20	12/50-7/52	15,000	10,000	0	132	0.0	1320
Mo.	Truman Road-Kansas City (Oak Street to Brooklyn Avenue)	U	1.20	12/50-7/52	25,000	17,000	1	504	5.9	2965
Ohio	US 40 (Madison C. L. to Columbus)	R	7.53	1951-52	11,000	60,400	7	165	11.6	273
Ohio	US 22 & Ohio 3-Clinton Co. (Jct. O-380 to Wilmington)	R	4.58	1951-52	2,150	7,400	0	26	0.0	351
Ore.	Columbia River Hwy, US 30 (Portland to Scappoose)	R	10.80	1949-52	4,160	65,577	7	269	10.7	410
Ore.	Sunset Highway, US 26 (Jct. Oregon 53 to Jct. Oregon 47)	R	39.51	1949-52	1,840	106,238	19	568	17.9	534
Ore.	Pacific Highway East, US 99E (Salem to N. Jefferson Jct.)	R	8.72	1948-52	6,640	105,826	12	496	11.3	469
Ore.	Pacific Highway East, US 99E (Albany to Tangent)	R	5.53	1946-52	5,310	75,009	9	272	12.0	363
Ore.	S.E. Union Avenue (Portland)	U	1.47	1949-52	24,100	51,736	0	1,173	0.0	2270

Table 3.—Accident experience: Highways with no control of access (continued)

P. 31 (SHEET 5)

State	Route	Type of area 1/	Length Miles	Period	Average daily traffic	Vehicle-miles Thousands	Number of Fatalities	Number of Accidents	Rate 2/ of Fatalities	Rate 2/ of Accidents
R. I.	R.I. 122, Mendon Road (Woonsocket to Valley Falls)	R	6.6	1953	6,380	15,365	4	50	26.0	325
R. I.	Olneyville Square, Providence, and the 7 major roads serving the square within the limits of Olneyville Bypass	U	1.4	1953	12,990	6,639	0	39	0	587
S. D.	US 14-16 (E. city limits of Rapid City, 7.314 miles east) - Old route	R	7.31	1950-52	6,740	54,030	4	171	7.4	316
Va.	US 1, Section 1, Fairfax County	R	13.30	9/49-8/50, '51, '52	9,960	150,672	24	911	15.9	605
Va.	US 1, Section 2, Arlington	U	1.50	1951-52	20,250	22,176	2	191	9.0	861
Va.	Route 168 (N. of Newport News)	R	6.54	1951	9,200	21,968	2	223	9.1	1015
Wash.	US 10 (Spokane East to Greenacres)	R	8.5	1949-51	9,500	88,400	4	707	4.5	800
Wash.	Seattle to Bothell (PSH #2)	R	8.1	1949-51	11,700	104,000	8	927	7.7	890
Wash.	US 99 (Castle Rock to Kalama) - Old route	R	16.0	7/48-6/49	6,000	35,040	5	298	14.3	850
Wyo.	US 20 & 26 (1.5 miles west of Casper to west corporate limits)	U	1.5	1952	5,925	3,246	1	38	30.8	1171
Total	.....	.....	890.32	.....	.....	16,266,188	1,303	66,356	8.0	408

1/ R = rural; U = urban

2/ Number per 100 million vehicle-miles

3/ Total mileage figure below does not include duplicated mileage introduced by reclassification of this entry from "Rural & Urban" to "Urban."

[fol. 38]

IN THE UNITED STATES DISTRICT COURT

ORDER OF COURT—November 16, 1955

And Now, to-wit, this 16 day of November, 1955, defendants' foregoing motion to amend their motion for summary judgment will be and hereby is granted.

/s/ Rabe F. Marsh, D.J.

[fol. 38a] [File endorsement omitted]

[fol. 39]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action File No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841 (Equitable Action)

JACK C. MARSHELL and ALICE E. MARSHELL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Commonwealth of Pennsylvania,
County of Allegheny, ss.:

AFFIDAVIT OF LEONARD P. KANE OFFERED BY PLAINTIFFS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT—
Filed November 25, 1955

Leonard P. Kane, being duly sworn, deposes as follows:

1. I am a resident of the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania, and I am a duly licensed real estate broker there.

2. In the past, I have testified as an expert on real estate [fol. 40] valuations and related and similar subjects in Pittsburgh on frequent occasions.

3. My qualifications include the following:

(a) I am familiar, in a general way, with the litigation pending at the above numbers, wherein the Plaintiffs are various property owners, owning real estate which abutts the highway approximately five miles in length immediately west of the Greater Pittsburgh Airport, and commonly known as the Airport Parkway.

(b) At the time that the highway was designated as open, which was approximately in the year 1949, I was consulted by one or more of the property owners whose property, in part, was taken by eminent domain by the County of Allegheny for the purposes of said highway, and who were left with the remaining portions of their respective tracts, and who desired damages from the County of Allegheny by reason of said taking. Pursuant to the practice in Pennsylvania, the claims of those owners, whose land, in part, had been taken for the purposes of said highway, came to be heard in the first instance before viewers, duly appointed by the Court of Common Pleas of Allegheny County, Pennsylvania, for the purposes of ascertaining the damages which should be payable in each instance. Those particular hearings were before the panel of viewers composed of Messrs. McJunkin, Scanlon and Donaldson. One of those viewers, Mr. Scanlon, since has died, and Mr. McJunkin is reported very seriously ill in a hospital, and un-

able to appear in court. The third member, Mr. Donaldson, I am informed, now resides in Chicago, Illinois.

[fol. 41] (c) In negotiations, and conversations which I had with the attorney representing the County of Allegheny, and in the proceedings before the said viewers, all of which were in regard to how much damages whould (sic) be paid to the people for whom I spoke, it was the County's contention and the position adopted by the viewers, that any award of damages for the taking of land should be diminished by reason of benefits which inevitably would accrue to the land remaining to the owners, because of such land having direct and uninterrupted access to the new highway with all the commercial development that such access would make possible. The viewers stated to me, in each instance, categorically and directly, that there was no indication that anyone would ever attempt to obstruct, in any way, the free and direct access of the owners to the new highway and that such possibility must be denied any consideration in the matter of fixing awards of damages. The responsible officers of Allegheny County in charge of this work repeatedly informed me that such was the County's position.

The said highway is now open and the abutting property owners, who constitute the Plaintiff class in the above-captioned actions are deriving or in the future will derive great financial benefits from the direct access which they have; this is particularly true with regard to gasoline filling stations which recently have been erected on two or more of said abutting pieces of land, and of restaurants, mercantile or business establishments, amusement parks, and other commercial developments, which have been placed there. The possibility of development and enhancement of land values with reference to the other abutting pieces of land on said highway will depend, to a very large extent, upon the feature of direct access to said highway.

[fol. 42] It is obvious that a mercantile or business establishment, gasoline filling station, amusement park or other business, will lose a great percentage of the trade which otherwise it would have, should its direct access to the highway be cut off, and consequently, the value of such property on the market will depreciate greatly. Being familiar with these properties as I am, and having observed them recently,

and having testified with reference to one or more of them in the viewers proceeding aforesaid, I believe that the shutting off of direct access to the highway, with reference to said properties, will reduce them, from the standpoint of valuation, to the grade of farm land or lower, since many of these properties have been rendered unusable for farming by the new highway, with its many cuts and fills. In this instance, such down-grading will probably mean a reduction of at least 75% in their market valuation. Already, semi-public announcements that access will or may be barred, emanating from the Highway Department or from other sources have had a chilling effect upon the public's idea of the value of the abutting lots, and unless this fear is removed, it is only reasonable to suppose that the chilling effect will continue and further depreciation in value can be expected in the immediate future. In the aggregate, the depreciation in the abutting land along the said five mile stretch, which will result from the shutting off of direct access, will produce loss in market valuations, probably in excess of $1,000,000.00, and in my opinion, the loss might be greatly above that figure.

/s/ Leonard P. Kane

(Seal)

Sworn to and subscribed before me the 13th day of October, 1955.

(Seal)

/s/ Edward P. Good, Notary Public, Pittsburgh, Allegheny County. My Commission Expires May 11, 1959.

[fol. 42a] [File endorsement omitted]

Acceptance of service (omitted in printing).

[fol. 43]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action File No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. D. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841 (Equitable Action)

JACK C. MARSHELL and ALICE E. MARSHELL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Commonwealth of Pennsylvania,
County of Allegheny, ss.:

AFFIDAVIT OF J. CAL CALLAHAN OFFERED BY PLAINTIFFS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT—
Filed November 29, 1955

J. Cal Callahan, being duly sworn, deposes as follows:

1. I am Director of the Planning and Transportation Division of Morris Knowles, Incorporated, a firm of Civil Engineering Consultants with home offices in Pittsburgh, Pennsylvania. I reside at 115 Parker Avenue, Easton, Pennsylvania, and I maintain my office in that City.

[fol. 44] 2. I am a graduate in Civil Engineering from the University of Michigan with the degree of Bachelor of Science in Civil Engineering. I attended Xavier University in Cincinnati, Ohio, preparatory to my enrollment in Engineering School. At the University of Michigan, I specialized in Highway Engineering and Traffic Control. I am licensed to practice Civil Engineering in the Commonwealth of Pennsylvania and am a member of the National Society of Professional Engineers.

3. In 1935, I became Traffic Engineer in the Traffic Survey Bureau of the Detroit Police Department. My work there entailed study and control of traffic flow, parking and related matters. Later, I assumed the duties of Assistant Director of the Detroit Office of the Michigan State Highway Planning Survey. This survey was the first of its kind and was jointly sponsored by the Michigan Highway Department and the United States Bureau of Public Roads. In this capacity I was in direct charge of a parking study of Downtown Detroit and of the compilation and analysis of traffic flow data basic to the design of a limited access throughway system. That study was the basis of the entire design of the road system of Michigan. I later went to Lansing, Michigan to conduct an accident investigation study in conjunction with the Michigan State Police Department, and to direct the compilation and analysis of state wide traffic flow date (sic) for the Michigan State Highway Department. After a brief period of private consulting work in Cincinnati, Ohio I entered the Armed Services. I served as a Commissioned Officer, as Transportation Officer for Engineer Intelligence in the European Theater of Opera-[fol. 45] tions. Prior to D-Day, on loan from the Corps of Engineers to the Theater Provost Marshall's (sic) Office, I conducted a study of military traffic flow and accidents in the United Kingdom. On discharge from the service in 1945, I assumed my present position as Director of the Division of Planning and Transportation for Morris Knowles, Incorporated. In my present capacity, I am responsible for all phases of my company's planning and transportation consulting work which includes highway planning, traffic control, parking studies, land use plans, transportation and circulation plans, urban and rural zoning, redevelopment

and urban renewal and site planning and land development. I am currently engaged in active studies of traffic control and circulation in Erie, Reading, the Lancaster area, Easton, Meadville and a number of Boroughs and Townships. I hold full membership in the American Society of Civil Engineers and am a member of the Executive Committee of the Society's City Planning Division. I also hold membership in the Society of American Military Engineers, the American Institute of Planners and other National Societies.

4. I have studied carefully the Affidavit of Joseph Barnett filed with the Court in connection with the above captioned actions. I have also made a careful field study at first hand of the location and situation of the Highway in Allegheny County, Pennsylvania, known as the Airport Parkway. I have noted the fact that there are few intersecting roads, none of which now carry nor, in my opinion, are likely to develop volumes of traffic which will conflict seriously with the flow of traffic on the stretch of road in question. I believe, therefore, that denial of access from [fol. 46] any or all of the intersecting roads would have little if any effect on the traffic capacity of the Airport Parkway between the intersection of Route 22-30 and the Airport.

5. I have further noted that the 4-lane separated dual road construction now terminates at a cross-road immediately adjacent to the Airport. This makes the generation of traffic on the portion of road in question virtually dependent on the traffic generating capacity of the Airport and terminal operation. I question, aside from possible occasional sporadic peak demands, if this single traffic generator will produce the need for highway capacities of the magnitude of 1500-2000 vehicles per lane per hour on the stretch of road in question, cited by Mr. Barnett in his statement.

6. In my opinion, the statistics contained in Circular Memorandum No. F-2.22 of the United States Department of Commerce, Bureau of Public Roads, dated April 25, 1955, entitled "Accidents Experience on Controlled Access Highways" and the accompanying tables attached to Mr. Bar-

nett's statement, while constituting evidence of a general tendency toward overall benefits in the use of access control on some arterial highways, by no means constitute sufficient and conclusive evidence in support of an application of this generalization to the specific stretch of road in question, I cite the following excerpt from the said Circular Memorandum: "The overall safety benefits of access control are plainly evident from the information already assembled. These benefits *can not be fully evaluated however without much more data than are currently available.*" (Italics supplied.)

[fol. 47] 7. I do not believe that there is any conclusive data to support a theory that a limited access or non-access highway insures safety per se. Although a non-access or limited access highway may reduce accidents per mile in comparison with other types, it does not follow that the total degree of severity will be lessened. There is good reason to believe that due to the increased speed on limited or non-access highways, the proportion of fatal accidents, or serious personal accidents, are greater than on the average highway. The rate of fatal and bad accidents on the Pennsylvania Turnpike, which is a limited access highway, is a source of constant concern—so much so that additional patrol personnel have been authorized from time to time in continuing attempts to reduce excessive speed. The most that can possibly be said in favor of the limited or non-access highways in that regard is that they may decrease the number of small accidents; but, on the other hand, they certainly appear to increase greatly the percentage of bad or fatal accidents.

8. In conclusion, while agreeing with the theory of limited access arterials in principle with the reservation concerning severity of accidents set forth in Paragraph 7 above, I believe that in applying this principle to specific circumstances in which it appears the utility value of existing and potential roadside uses may be substantially inhibited, the traffic flow and accident data must demonstrate conclusively beyond a doubt that overall benefits will accrue in order to justify curtailment of access. It is my conclusion that, with respect to the stretch of road in question, the

sufficiency and conclusiveness of traffic flow and accident data made by Mr. Barnett in his Affidavit, and in the tables [fol. 48] attached thereto, are not only questionable generally, because of the admittedly inadequate data, but bear little or no relevance to the particular highway under consideration, the Airport Parkway between the inter-section of Route 22-30 and the Allegheny County Airport.

/s/ J. Cal Callahan

Sworn to and subscribed before me this 22nd day of November, 1955.

/s/ Lottie R. Keys, Notary Public, Pittsburgh, Allegheny Co., Pa. My Commission Expires January 6, 1957.

(Seal)

[fol. 48a] [File endorsement omitted]

Acceptance of service (omitted in printing).

[fol. 49]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

AFFIDAVIT OF DONALD M. MCNEIL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT—Filed December 2, 1955

Commonwealth of Pennsylvania,
County of Allegheny, ss.:

Before Me, the undersigned authority, personally appeared Donald M. McNeil, who, being duly sworn according to law, deposes and says that:

1. He is a registered professional engineer in the State of Pennsylvania, being a graduate in Civil Engineering from the University of Pittsburgh. His occupation is that of a private consultant specializing in traffic and transportation problems.

2. He is a member of the American Society of Civil Engineering, Past President of the Institute of Traffic Engineers, and Vice-President of the Western Pennsylvania Section of the Professional Engineers Society.

[fol. 50] 3. He was associated with the Bureau of Traffic Planning of the City of Pittsburgh for 26 years, of which 18 years were served as Chief Engineer. He has performed consulting services for the Commonwealth of Pennsylvania and about fifty communities within a radius of 100 miles of the City of Pittsburgh. He is retained by Pittsburgh Railways Company, Yellow Cab Company, and Western Pennsylvania Business Association for special services of an engineering nature.

4. He has read the affidavit of Joseph Barnett filed in this action and agrees with the conclusions therein expressed. He is of the opinion that no competent traffic engineer versed with the problem would conclude otherwise. He believes that the conclusions expressed by Joseph Barnett in said affidavit are applicable to the Airport Parkway in Allegheny County.

5. At the Institute of Traffic Engineers held in Pittsburgh in October, 1955, the problem of highways was discussed. The following extract from the Summary Statement of the Work-Conference on Traffic Problems expresses the unanimous view of the engineers there present:

> "To provide for the maximum efficiency of all new major highways, access control is essential in both urban and rural areas. Roadside protection, through the regulation of exits and entrances, must be carried out on all existing traffic arteries in order to recapture and preserve the value of these highways."

6. The Airport Parkway in Allegheny County is four lanes wide (two lanes in each direction) with a medial strip divider. He believes that the road meets all modern designs for highways of limited access character.

7. Saw Mill Run Boulevard in Allegheny County was originally developed as a three lane undivided highway; it has since been increased to four lanes with a medial strip.

[fol. 51] It was originally designed to carry traffic at 50 miles per hour; at the present time it can carry traffic safely at no greater than 35 miles per hour. The reduction in the safe speed of the road, as well as the lessening of its capacity, has resulted, he believes, from the growth of roadside businesses, there being no restriction on ingress and egress. He believes the same thing will happen to the Airport Parkway in a comparatively short time if roadside businesses develop to the point where they are likely to progress if unimpeded by access control.

8. He believes that by 1975 highway traffic in the United States will double in volume, making imperative the need for controlled access highways.

9. In short, he believes that limited access, as compared with unlimited access, highways have the following advantages, all of which would be applicable to the Airport Parkway in Allegheny County:

(a) They are safer because of the elimination of direct entry, particularly the maneuvering into and out of roadside establishments.

(b) They preserve their capacity by eliminating the accumulative effects of vehicular movements in the marginal lanes of travel into and out of roadside establishments.

(c) They promote economical motor vehicle operation by minimizing the number of stops and starts incident to travel through a maze of roadside businesses having direct access.

(d) They safeguard the existing public investment by insuring that the highways will not quickly become physically and functionally obsolescent.

[fol. 52] (e) They reduce accidents by diminishing traffic hazards.

(f) They assist in the orderly development of communities by providing transportation arteries that are relatively permanent in character.

/s/ Donald M. McNeil

Sworn to and subscribed before me this 1st day of Dec., 1955.

/s/ Madeline Cowan, Notary Public. My Commission Expires January 27, 1957.

(Seal)

[fol. 52a] [File endorsement omitted]

Acknowledgment of service (omitted in printing).

[fol. 53]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

MOTION TO AMEND ANSWER AND ORDER GRANTING SAME—December 16, 1955

Come Now defendants by their attorney, Leonard M. Mendelson, and move the Court for leave to amend their Answer by deleting the following sentences of Paragraph 4:

> "The fourth sentence of paragraph 4 of the complaint is denied in its entirety. Although Defendants have been discussing with the proper officials of the County of Allegheny the advisability and feasibility of the Commonwealth's taking over the said highway and establishing it as a "Limited Access Highway," no decision with respect thereto has yet been reached."

and by substituting in lieu thereof the following:

> "Defendants admit that they are about to take over the said Airport Parkway and establish it as a Limited Access Highway."

/s/ Leonard M. Mendelson, Attorney for Defendants.

[fol. 54]

ORDER—December 16, 1955

And Now, to-wit, this 16 day of December, 1955, the within motion will be and hereby is granted and it is ordered that defendants' Answer be amended as set forth in the within motion.

/s/ Rabe F. Marsh, D.J., /s/ John L. Miller, D.J.

The foregoing is consented to.

/s/ Edward P. Good, Attorney for Plaintiffs.
/s/ Leonard M. Mendelson, Attorney for Defendants.

[fol. 54a] [File endorsement omitted]

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 56]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action File No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841 (Equitable Action)

JACK C. MARSHELL and ALICE E. MARSHELL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

STIPULATION OF COUNSEL—Filed December 19, 1955

It is hereby stipulated by and between plaintiffs, by their attorneys, Kountz, Fry & Meyer, and defendants, by their attorney, Leonard M. Mendelson, that:

[fol. 57] 1. If the Secretary of Highways declares the Airport Parkway to be a limited access highway, certain members of the plaintiff class, in Civil Action No. 13672, will be denied access to any public or private road now existing, and will have no local service roads to afford them means of ingress and egress from their property.

2. The Commonwealth does not propose to take any land of any members of plaintiff class, but proposes to take a road already in existence.

3. Although the Airport Parkway, if declared to be a limited access highway, will not be the first limited access highway in Pennsylvania, it will be the first instance in which the Commonwealth will have taken over an existing highway, unlimited in its access and declared to be a limited access highway.

4. At the time of the construction of said highway by the County of Allegheny, the County condemned in 1949, by eminent domain, the necessary quantities of land, including, in some instances, land taken from the properties of some of the plaintiffs in the action at No. 13672.

Subject to the defendants' objection that all of the following evidence is irrelevant and immaterial in this action and without waiver on the part of the defendants of [fol. 58] the right to interpose said objection at any appropriate stage of this litigation, the parties agree to the following facts:

5. In making allowance for the damages to the aforesaid persons whose land was condemned for the construction of the highway, it was the contention of the County that consideration should be given to the special benefits which it claimed said persons would derive by reason of

having frontage on a new highway and direct ingress and egress thereto and therefrom.*

6. Before the Board of Viewers at No. 2845 April Term, 1949 "A", John K. Creasy, one of the property owners affected by the condemnation, on behalf of his own claim, testified as follows:

"Q. Can you get across the new road at the present time, or will you when the new road is completed from the lower portion to the upper portion?

A. Absolutely not."

7. Mr. Wright, attorney for John K. Creasy, said:

"Mr. Wright: Here is a farmer who had some cattle. Separation of a farm and rendering a portion inaccessible is an element of damage. I don't know whether Duff should decide this question or the Commissioners."

8. Mr. Bair, Attorney for the County of Allegheny, said:

[fol. 59] "Mr. Bair: I don't question that is an element of damage, when a farm is divided into two pieces. As to whether that element might be mitigated by crossing the road from one section to another, Mr. Duff is not in a position to answer that generally."

9. Again, John K. Creasy further testified as follows:

"Q. How do you get to 22 and 30?

A. I have to go seven miles around Beaver Grade Road.

Q. You will be able to go down to where the junk yard is, where they are going to have an interchange?

A. Yes.

Q. How close will that be?

A. It is a mile from my place to the junk yard and 1½ miles back to 22 and 30.

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*Except as otherwise specifically designated, each of the following paragraphs refers to proceedings before the Viewers or in the Common Pleas Court, with regard to the taking of the land for the construction of the aforesaid highway.

Q. That would be 2½ miles?

A. Yes."

10. Alfred S. Hershberger, a witness called on behalf of the plaintiff, testified as follows on cross examination:

"Q. In arriving at your opinion of the value afterwards, were you considering that Mr. Creasy had no access on the new highway at any point on his land? [fol. 60] A. That is a question I wasn't sure of. Even if he had access to it, I placed my value on that upper land for the simple reason I don't see how that man is ever going to get much good out of it. That is going to be a pretty high speed road there coming off Steubenville Pike going west. From a farming standpoint, not much good out of it.

Q. Any good out of it from any other standpoint?

A. He might be able to sell it to someone else for some other reason. I don't know.

Q. It is your opinion that the property up along Steubenville Pike is valuable and it is a high speed highway?

A. Yes.

Q. Why not this?

A. You have cuts and fills; left this property in bad shape.

Q. All along the Steubenville Pike coming up from Thornburg you have hillside and that is used for commercial purposes?

A. Where is that?

Q. Coming up the Stuebenville Pike, beginning at that Superior Steel Company there?

A. That is a fine piece of property.

Q. Hillsides along there?

A. Some are no good. The hilly property isn't used.

Q. Certain portions are used, are they not?

[fol. 61] A. I cannot recall where they are.

Q. Isn't it possible that this road leading into a big airport could possibly change the category of this ground and convert it into a bigger and better use than enjoyed before?

A. This particular piece, I wouldn't say that's true.

Q. Generally speaking, a new highway of this type leading to a very large new airport generally changes the category of the land throughout?

A. Yes.

Q. Generally speaking, such a road leading to this airport will help the land?

A. Generally speaking, a wonderful effect.

Q. Benefits a lot of these tracts of land?

A. A lot but not this one.

Q. Why not this one?

A. You have a series of cuts and fills on this property.

Q. Then you did decide in arriving at your opinion of value there is not place along this road where Mr. Creasy can get access?

A. I think he was using it for farm purposes. He would never try to drive a horse across it nor a tractor. If he did, he would get killed.

Q. Assuming there are some accesses and keeping in mind he would be benefitted to some extent, that should be an element which should be taken into consideration here?

[fol. 62] A. No.

Q. Why can't it be taken into consideration if we could assume there are some points where he would have access to the new road?

A. He would have to build a new road up that hill.

Q. He had a hill before?

A. He had a better chance to build a road up there before.

Q. You didn't take that into consideration in this case at all, this road is leading to a new airport and will benefit the property generally?

A. I would say it won't benefit this property.

Q. Where is it more likely for a property to develop, along a new paved highway of this type, or along a red dog type of road like the Scott Station Road?

A. That depends upon the property and for instance when you put one of these roads in what you do to it.

Q. With the exception of this property, you think the road does help generally throughout this area?

A. No, there are some other farms in there you have badly hurt, the farm adjoining this property."

11. West S. Brown, a witness called on behalf of the claimant, testified as follows on cross examination:

"Q. Mr. Brown, do you agree with Mr. Hershberger that a new wide paved road of this type leading to a new modern airport is generally beneficial to the land throughout the area?

[fol. 63] A. Benefits some land, but when cuts and fills run from 25 to 100 feet, I don't see how it is going to benefit this property; cuts on the south side 75 to 100 feet. Right at the road where this private road crosses the property 25 feet on the south side. Right below that two or three of them. How are they going to get acess to the upper side of this road? . . . .

Q. In arriving at your opinion of value, were you considering there was no access to the new road from any point on this land?

A. I don't think there is any point of access.

Q. If access was visible with some adjustment at some point along the new road, would that change your idea of the damage?

A. It might change my opinion, but the upper side of the road it is impossible to get any good out of it. On the lower side, I don't spe how it is possible to get on to this highway. I have been all over it. There is no way to get on it."

12. J. C. Gordon, a witness called on behalf of the County of Allegheny, testified as follows on cross examination:

"Q. As an engineer, where would you try to get access to this upper end of the road?

A. By the Socony Vacuum lines, station 32. The road could probably be carried along the top of the cut over to station 32 with the idea of crossing there and coming back to the top of the cut.

[fol. 64] Q. There aren't too many places you could get in?

A. Not too many. Crossing where the cut and fill meet at station 39. There not many places you can cross. It would be rather difficult."

13. Thomas McCaffrey, a witness for the County of Allegheny testified as follows:

"Q. Did you consider the taking of farm machinery across this new high speed highway or making himself a road on both sides of it?

A. Your question involves considerable thought. I considered the property was typed by reason of this highway. The best part of the farm is below his own private road, towards its buildings. Portions of this property absolutely difficult to utilize to physical conditions and so stated by other witnesses. The area through which this highway progresses is through normal low land and both the cuts and fills are going to be difficult. Yet, again, it fronts on the new Airport Parkway, a highway which leads to this new improvement of Allegheny County, and in my judgment a property of this size remaining should sell.

Q. Do you think this property has been benefitted in any special manner which is not common to all of the neighborhood?

A. I do.

Q. In what way would any benefit might accrue to this property different than that enjoyed by other properties?

[fol. 65] A. I think that any property even though subject to cuts and fills would benefit by an improvement of this nature. It was mentioned by Mr. Brown there can't be any more difficult real estate if you follow through the Steubenville Pike, on account of how the cuts were put in. Little businesses crop up.

Q. They didn't crop up on the hillside on the level part?

A. On hillsides too on account of this improvement. Go out Route 30 east and see the conditions. You got to compare land.

Q. I think you are putting a general benefit on this property rather than a special benefit?

A. A general benefit will go to anyone who abuts it.

14. In the Creasy case, testimony was substantially the same before the Court of Common Pleas, as that set forth above before the Board of Viewers.

15. In the Bessie G. Noble case, also No. 2845 April Term 1949 "A", West S. Brown, an expert witness called on behalf of the property owner, Bessie G. Noble, testified before the Viewers on cross examination as follows:

"Q. In arriving at your opinion of value, did you take into consideration that this property would have access on to the new road?

A. I considered it afterwards that it wouldn't have access."

[fol. 66] 16. In the case of Edward K. Nanz and Marcella Nanz, also at No. 2845 April Term 1949 "A", J. C. Jordon, an expert witness called by plaintiff property holders, testified as follows:

"Q. There is a dividing line on the new highway between the north and south traffic?

A. Yes.

Q. A person going from the Nanz property will not be able to go southwardly without going up to one of these interchanges?

A. The present construction calls for the end of the center barrier through there at Station 107.

Q. In other words, you are not going to have a center divisor all the way?

A. Center divisor—stops at station 107. Beyond that the County does not contemplate putting a separator in front of this house. However, the future development of the overpasses, etc., I am unable to say anything about that.

Q. If they carry on the plan further to the south they will have a divisor?

A. That's right.

Q. Where that divisor is?

A. I wouldn't say it is impossible. It is put there for the purpose of separating traffic."

17. West S. Brown, an expert witness called on behalf of the plaintiff property owners, testified as follows on direct examination:

[fol. 67] "Q. Does that ditch in your opinion affect the property after the improvement?

A. Certainly does affect the ingress and egress. Also building this road the ingress and egress have been affected as they can only go one way coming out of the property."

18. Said West S. Brown testified as follows on cross examination:

"Q. Mr. Brown, you said the ditch takes away the ingress and egress. Do you mean to say these people will be prevented from traveling on that private road?

A. The ingress and egress.

Q. You don't mean they cannot get into their house?

A. No, in front of their property.

Q. I believe you stated they can only go one way off this private lane?

A. I mean after this improvement. They can go only one way on this new highway.

Q. Which way?

A. To the north.

Q. Why?

A. Because there will be a big curb in the center there. They can't go over.

Q. Did you hear Mr. Jordon say there was no separator planned in front of this property?

A. It is marked down there. You can see it.

[fol. 68] Q. So if there is no separator here on this property they would be able to go either way?

A. Either way off the lane. After all, my damages are the ingress and egress to their property. The rear end of the property is not affected in my estimate of damages.

Q. So Mr. Jordon is correct about there being no separator in front of this property?

A. I didn't hear him say that. If he said that it is o.k. with me.

Mr. Scanlon:

Q. Before could they get off the old road any place to their property?

A. Yes.

Q. How would they get up the hill outside of this private road?

A. Yes, the private road goes up there. The ingress and egress this property might have after the improvement with that big ditch in front of it—if they filled it in would cost more."

19. Thomas McCaffrey, an expert witness called on behalf of the County, testified on direct examination, as follows:

"A. That old road was paved 18-20 foot surface. The new road is a varied width in front of this property ranging from 100 to 145 feet of right-of-way. My impression is that the new road is an excellent improvement for all properties in this section."

[fol. 69] 20. Said Thomas McCaffrey, on cross examination, testified as follows:

"Q. Do you consider that a property with a ditch in front of a property like this, even though it be on a fine new highway, is as advantageous as an old surfaced road?

A. There would be a ditch.

Q. You heard Mr. Jordon testify that the ditch will not be covered up?

A. Yes.

Q. How deep is that ditch. About 4 feet, isn't it?

A. Four feet as on the plan.

Q. You know there is about 80 feet depth?

A. At that point on the plan—widened out it shows only a fill of one foot.

Q. It prevents people from getting on to the highway except at the lane?

A. There isn't anything new about a condition like—If and when they want to put a pipe in there.

Q. How much do you think it would cost to put a pipe in there?

A. I wouldn't even indicate that.

Q. They couldn't do it for an allowance of $200.00?

A. But for the purpose of their property they would get at least that much money.

[fol. 70] Q. Do you know anything about the fence?

A. There was a fence taken.

Q. Do you make any allowance?

A. Just as an element.

Q. How much of that $200.00?

A. As I said, that property would sell for as much with a little adjustment.

Q. No allowance for the fence nor for the ditch?

A. No.

Q. It is not an element of benefit?

A. No but the highway certainly is."

21. In the W. J. Parish case, also at No. 2845 April Term 1949 "A", West S. Brown, an expert witness called on behalf of the plaintiff property owners, testified as follows:

"Q. In your opinion don't you think William J. Parish will be able to use this property the same as before?

A. Not the same as before. Destroyed all the cradles in the rear. The property destroyed. The well which they drilled in there at the rear of the property will be destroyed. You brought a fill so close to the tanks to the gas tanks that I don't think they could use that even if they supported the fill they wouldn't have enough egress and ingress to get around those tanks. [fol. 71] You took 13 feet of ground without the fill and had room to drive in and out. Now the fill in front of these tanks 5 feet and if they built a wall in there down to the west end of the lot they wouldn't have egress and ingress."

22. In the Joseph and Santa Margaret Scaletto case, at No. 2993 January Term, 1950, West S. Brown, an expert witness called on behalf of the plaintiff property owners, testified on direct examination as follows:

"Q. As it might appear to a buyer how in your opinion has this property been affected by this improvement?

A. It now sets below the new highway about 15 feet. The old road which traverses north and south in front of this property has been cut off at the north end and instead of having a nice road and outlook from that part of the property there is now a big fill from 10 to 18 feet high, and at the north end there's been a great culvert where the creek had been changed under the highway which is not such a nice outlook as before. Where before the Cliff Mine road met the old highway, now it is about I would say 10 feet higher than the old highway was. The ingress and egress of the property has been affected because south of the property instead of having a hard road you run into the berm of the road which is mud."

Said West S. Brown, in said case, testified as follows on cross examination:

[fol. 72] "Q. Wouldn't you say the new highway is better than the old state road that was there before?

A. Oh, of course I would say that.

Q. As a result of that wouldn't you say that has increased the value?

A. No, I wouldn't. The road has been cut off within ten feet of that property and the egress and ingress has been cut off and they are now 15 feet below the new highway."

23. In the Jessie A. Dougherty case, at No. 2845 April Term 1949 "A", Alfred S. Hershberger, an expert witness called on behalf of the property owners, testified as follows:

"Q. What outlet does the lower part of the farm have or will have?

A. As to where?

Q. To any outside public road?

A. Well, if Creasy puts a fence up there now, won't have any outlet.

Q. The only outlet that has been in use is the right-of-way over the Creasy property?

A. That is right.

Q. Aside from it, would you say this lower land is landlocked, this lower tract?

A. I would say if you shut that property off it is landlocked.

Q. No bridge there? A. No.

[fol. 73] Q. No right-of-way across?

A. No sir.

Q. What about the upper tract?

A. That is in bad shape. On the south side of the new road you have a series of cuts and fills. I don't see how you are going to get into it.

Q. Is there any outlet across any abutting property up there?

A. No sir.

Q. You would characterize it as landlocked?

A. Yes sir.

Q. That is entered into your consideration of the $26,000 damages?

A. Yes sir.

Mr. Bair:

Q. What do you mean by landlocked?

A. As I understand it right now, since you have relocated the private road coming into the Dougherty farm, that does away with any prior right the Doughertys had in the Creasy road by adverse possession. If he put the fence up at that line at the easterly side of the property where he came in to the Dougherty property, that way out will be no more. Now I don't know how you are going to get out of this property. You have a railroad crossing if you go out the Cliff Mine Road and a creek; if you could get across that; a bridge across the Montour Creek would cost a lot of money though.

[fol. 74] Q. Creasy put a fence up there before the taking, didn't he?

A. I don't know who built that fence.

Mr. Donaldson:

Q. Your testimony, Mr. Hershberger, is based upon the assumption that all the ground remaining to the Dougherties is landlocked?

A. Yes sir.

Q. How can you say a piece of ground is landlocked when it lies on a road? I don't care what the fills and cuts are.

A. On this new road?

Q. Yes.

A. I don't see how they are going to go up those cuts and fills to get on that new road.

Q. I still wouldn't call it landlocked."

24. West S. Brown, an expert witness called on behalf of the plaintiff property owners, testified as follows on cross examination:

"Q. In arriving at that opinion of $15,000, are you considering the land has no access at any point along the new highway?

A. No, I don't think it has any access on the highway. The cuts and fills are big, especially around the building, 77 feet high; down toward the bridge 20 feet high; no access to the property on either side of the road.

[fol. 75] Q. Is it your opinion the property could not be used as a farm after the taking?

A. I don't think the upper part could be used. The lower part might be used as a chicken farm; never used as a large dairy farm as before or as an experimental farm.

Q. Why can't they use it as a dairy farm?

A. Because they don't have enough acreage to take care of 50 cows they had before, 50 cows all the time.

Q. You mean 132 acres wouldn't be enough?

A. 132 would be but there is no way to get ingress or egress either on the north or south."

Said West S. Brown testified as follows on direct examination:

"Q. Mr. Brown, in your opinion does the new Airport Road carry any benefit to the Dougherty property generally or specially?

A. No sir, it does not.

Mr. Donaldson:

Q. Are you also assuming, as was Mr. Hershberger, that you can't get in or out of this property any place?

A. No, I didn't figure that way. You don't have any access on it at all. That small road coming in there, I was on that case before. We had trouble. I am [fol. 76] talking about the people who owned the road, had trouble for 25 years. Now that the County has a new road, it will be much tougher to get in and out of the farm.

Mr. Blair:

Q. Do you think access could be developed at some point along the new road with some adjustment?

A. I don't think so. I don't think it could be developed without a terrific cost.

Q. I was referring to a point at station 60-61. Do you have that in front of you, Mr. Brown?

A. Yes, I got that.

Q. Referring to station 61, I notice a cut, in the center line 3.4 feet, side line 7.4 feet. Wouldn't that indicate there could be an access developed there with some adjustment?

A. I don't think there could be. You only have a small cut there. As you go down over the hill, it gets very, very deep there. I looked that over specially to see if there was any way to get into it. It goes down over a big gulley."

25. In the appeal by Jessie A. Dougherty to the Court of Common Pleas of Allegheny County, at No. 1226 October Term, 1949 "A" from the award of the Board of Viewers, the following statements are contained in the verified Petition filed by Jessie A. Dougherty:

[fol. 77] "By the construction of said road, the acreage not taken was bisected so effectually that neither portion is now accessible to or from the other portion, nor can either portion be used for the other portion or with it.

Further, all access, ingress or egress to or from the unappropriated portions of plaintiff's land has been completely cut off in fact, by the construction of the new road, and plaintiff is left without rights or redress at law or in fact to have or to claim or to obtain a substitute right-of-way, or access to her land from the public road system, to take the place of the right-of-way long enjoyed and appurtenant to her land, until its destruction and obliteration by the said improvement. Plaintiff's unappropriated land is so isolated and surrounded by lands of strangers from whom no way of necessity can be compelled, that it has no practical or market value."

26. In the case of Jessie A. Dougherty v. County of Allegheny, in the Court of Common Pleas, at No. 1226 October Term, 1949 "A", J. C. Jordon, an expert witness called on behalf of the plaintiff property owners, testified as follows:

"Q. Would you say that this road is designed and constructed to facilitate through and speeding traffic to and from the Airport?

A. It is designed for the rapid moving of traffic, complying with the State Code, between the Airport and the City of Pittsburgh. The purpose is to develop as rapid access as possible between the Airport and the City of Pittsburgh.

[fol. 78] Q. With the Airport Parkway as constructed down to 30 and 22, is it planned that this parkway will mean a through traffic highway at that point?

A. At 22 and 30 it joins what is known as the Campbell's Run Road. Campbell's Run Road is to be reconstructed. I am not sure but what the construction has already been advertised. That extends from 22 and 30 to Carnegie. They are also extending the new parkway from Carnegie on down to the Banksville Circle, and to Pittsburgh.

Q. That will go across Greentree, up the hill?

A. Yes. All of that is under plan and some of the work has been advertised. Some is in the progress of preparation. Some hearings have been held before the Public Utility Commission to secure approval.

Q. When the County and State gets through with this over-all plan you will have a through, speedy route from downtown Pittsburgh to the Airport?

A. Yes, that's right.

27. In the said case of Jessie A. Dougherty v. County of Allegheny, Alfred S. Hershberger, an expert witness called on behalf of the plaintiff property owners, testified as follows on direct examination:

"Q. This property has been rather thoroughly described by witnesses who have already been on the stand so far as its physical aspects are concerned. What do you have to add to that description?

[fol. 79] A. Well, it was undoubtedly left in a very bad condition. This place here was really a show place before this road went through there. It was a beautiful farm, and a very productive farm, and now it is left with this cliff on the south side along that frontage there. The access to the southern part of the property has been taken away.

Q. You mean the hilly part?

A. The hilly part, for alfalfa land, and of course he pastured the hollows.

Q. Can you get up those hollows now?

A. Not without a lot of difficulty off the new road, and of course it has been left with a bad drainage condition there. Those pipes that stick out over the bottom land, that stick out like canons, that water is going to be confined now and that water is bound to gully up that lower land there. . . .

Q. That upper land, does that have any access on any hard road by which you might be able to get to it?

A. No, that does not.

Q. There is no road coming in the back, or on the sides?

A. There is not, to my knowledge . . . .

Q. Now, suppose this road that Mr. Triggs was discussing were constructed from the bottom land to the highway and from the highway to the top land, do you think it would be feasible to take cattle across that highway to pasture?

[fol. 80] Mr. Mamula: That is a leading question and is improper.

The Court: It is leading. He can say what the change of values has been before and after.

Mr. Wright: I asked him whether it was feasible to take cattle across the highway.

The Court: He may give that as one of the reasons before and after, but you are putting words in his mouth now.

Mr. Wright: I will re-frame the question.

Q. In your opinion is it feasible to take cattle across that new highway?

A. Absolutely not. You might as well try to take them across Baum Boulevard out here."

28. In the charge of the Court in the Jessie A. Dougherty case, the following was said:

"The crossing of the divisor strip on the Airport Parkway, Section 1, is not in violation of any Act of the General Assembly of the Commonwealth of Pennsylvania. (request by defendant)

She also said that the right of access to the house up on this hill was interfered with by the County. That more or less is admitted . . .

She said because of this and because of the fact that access was cut off and because she cannot use this as a cattle farm any further she has been damaged."

[fol. 81] In that said Dougherty trial, the County of Allegheny, through its attorney of record and solicitor and assistant solicitor, filed a motion for new trial, containing the following allegations of error. (Printed record, No. 74 March Term, 1952, in the Supreme Court of Pennsylvania at page 90a, Paper books, 370 Pa. 239.):

"1. The Court erred in its charge to the jury i stating that the loss of access to plaintiff's propert had been admitted by the County of Allegheny.

2. The Court erred in its charge to the jury in mal ing the prejudicial remark, 'I don't think this far could be used as a cattle farm any further if it necessary to take those cattle over that highway.'

3. The Court erred in its charge to the jury i the expression of a personal opinion that 'They (plai tiff) could not take dumb cattle over the highway an they (plaintiff) couldn't take farm equipment ove that highway with safety in such a way as would b practical, in my opinion.' (parentheses supplied.)

4. Th Court erred in its charge to the jury i making the following prejudicial remark:—'In m opinion, that would be very inconvenient and in m opinion they (plaintiff) would have to have men ou there to stop traffic in order to get the cows and far equipment over there with safety.' (parenthes supplied)"

29. In the Opinion filed by the court in disposing defendant's Motion for new trial, the following appears:

[fol. 82] "As a result, plaintiff was deprived of a cess between the lower and upper portions of h farm . . . . .

It is also complained of by the defendant that th Court did not properly instruct the jury in regard the private road leading through the farm. Defenda complains that the Court in it charge, expressed a opinion that it would be impractical to drive 40 to 5 cattle back and forth across the new highway pasture. The court believes that the woods and fills both sides of the highway and the drains, and the nu ber of automobiles using same highway make the u of certain roads over this highway impractical. Th was purely a matter for the jury to decide and was not an arbitrary statement."

30. In the appeal to the Supreme Court of Pennsylvania in the said Dougherty case, the brief filed on behalf of said Jessie A. Dougherty sets forth the following as one of the questions involved:

> "Where a large, active and valuable dairy farm with modern buildings has been bisected by a 120 foot high speed highway, resulting in the loss of 20 acres of land, heavy cuts and fills, the imposition at several places of concentrated drainage, and the destruction of access between its two parts and likewise to the public roads, all of which render it useless for its former purpose, should a moderate verdict obtained at a fair and thorough trial now be set aside on appeal by reason of isolated technical irregularities in the evidence?"

In the said brief, the following appears in the counter history of the case:

> [fol. 83] "By this construction, it became impossible to cross the highway with her cattle or farm vehicles at any point . . . . the trial judge himself commented that, although, theoretically, access from the lower to the upper portion of the farm might be obtained by building a farm road across the highway at the westerly portion of the farm, the only place that cuts and fills were small enough for such construction, that such access was not practical for cattle and farm vehicles, and that the upper portion of the farm was entirely isolated by the highway. The private road to the nearby farm from the lower property was cut off by the toe of the fill supporting the Parkway, and the effect of the construction was to leave the upper farm with no access from any direction, and the lower part isolated unless a new private road could be obtained from the adjoining neighbor."

The argument set forth in the said brief contains the following statement:

> "It must be apparent, even without the aid of plans and photographs, that the heavy cuts and fills, the

concentration through four large drainage pipes of storm water on the bottom lands in the neighborhood of the buildings, the effective severing of the upper portion from the lower portion thereof, the type of modern high-speed highway construction similar to the Pennsylvania Turnpike, with no traffic lights and no grade intersections, the complete landmarking of the large or upper portion, and the cutting off the private road from the lower portion through the neighboring farm, which had been the only practical access to the entire farm, all of these combined have rendered the farm almost unusable."

[fol. 84] 31. On appeal to the Supreme Court of Pennsylvania, at 74 March Term 1953, the judgment of the lower Court in the said Dougherty case was reversed for reasons here immaterial and a new trial was granted.

In stipulating the truth of the facts hereinabove set forth, all parties involved reserve the right to argue, or to state the objection that any or all of them may be inadmissible because irrelevant or immaterial, or because they are inadmissible for some other legal reason.

Respectfully submitted,

A. E. Kountz, Kountz, Fry & Meyer, Attorneys for Plaintiffs.

Leonard M. Mendelson, Attorney for Defendants.

[fol. 84a] [File endorsement omitted]

[fol. 85]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

ORDER RE AFFIDAVIT OF LEONARD P. KANE

And Now, upon motion of A. E. Kountz and Kountz, Fry & Meyer, and upon consideration of the consent thereto by Leonard M. Mendelson, It Is Hereby Ordered And Decreed

that the Affidavit of Leonard P. Kane filed heretofore on behalf of Plaintiffs will be admitted to the record as a deposition. The said deposition will be subject to objections by Defendants on the grounds of relevance and materiality, and insofar as the deposition concerns conversations with others under the hearsay rule. It is further ordered and decreed that, if Defendants' Motion for Summary Judgment is dismissed, and a hearing upon the issue is held, Plaintiffs will call Leonard P. Kane to testify, if counsel for Defendants so requests.

/s/ Rabe F. Marsh, D. J., May 29, 1958 nunc pro tunc December 19, 1955.

This Order consented to this 19th day of December, 1955.

/s/ Leonard M. Mendelson, Attorney for Defendants.

[fol. 85a] [File endorsement omitted]

[fol. 85b]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672 (Equitable Action)

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

ORDER DISMISSING MOTION FOR SUMMARY JUDGMENT—February 20, 1956

And Now, this 20th day of February, 1956, after argument, defendants' Motion for Summary Judgment in the

above captioned action is dismissed. Exception noted to defendants.

/s/ Rabe F. Marsh, By the Court

[fol. 85c] [File endorsement omitted]

[fol. 85d] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 86]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841

JACK C. MARSHELL and ALICE E. MARSHELL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

STAY ORDER, ORDER CONTINUING TEMPORARY RESTRAINING ORDER AND DENYING REQUEST FOR INJUNCTION—May 1, 1956

The plaintiffs in these actions seek to have a statute of the Commonwealth of Pennsylvania (Act of May 29, 1945, P.L. 1108, as amended, 36 Purdon's Pa. Stat. Annot. §2391.1 et seq.) declared violative of the United States Constitution and to have the defendants permanently enjoined from proceeding to act under authority given to them by that statute. Under the statute the defendants are given authority to de- [fol. 87] clare existing highways in the Commonwealth of Pennsylvania limited access highways. The establishment of such limited access highways is, of course, a matter of general and vital interest to the people of Pennsylvania. In this situation and, further, because the court is of the opinion that there is a substantial Federal question involved depending upon the construction given to the statute, this court should await the construction of the statute by the courts of the Commonwealth of Pennsylvania. At the pretrial conference in December, the court indicated to counsel the advisability of such procedure. The court has been informed that the parties have recently instituted such action in the Common Pleas Court of Dauphin County, Pennsylvania.

In consideration of the foregoing, It Is Now Ordered this 1st day of May, 1956, (1) that all proceedings in this court in these matters be stayed until a definitive construction of the Act of May 29, 1945, P.L. 1108, as amended, 36 Purdon's Pa. Stat. Annot. §2391.1 et seq., by the State courts be had, provided that the parties diligently pursue the remedies in the State courts; (2) that the temporary restraining order heretofore entered on August 1, 1955, in Civil Action No. 13672 be continued in force and effect until further order of this court; (3) that the request of the defendants for an injunction against J. K. Creasy and his wife and George J. Paulos and his wife and the request of the defendants that the plaintiffs be required to file bond are hereby severally denied, without prejudice, however, to the defendants to renew their application in the State proceedings and without prejudice to any of the plaintiffs or de-

fendants to seek such further relief in the State courts as they may deem fit and proper.

/s/ Staley, Circuit Judge, /s/ Rabe F. Marsh, District Judge, /s/ John L. Miller, District Judge.

[fol. 87a] [File endorsement omitted]

Proof of service (omitted in printing).

[fol. 88]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, et al., Plaintiffs,

v.

JOSEPH LAWLER, et al., Defendants.

Civil Action No. 13841

JACK C. MARSHELL, et al., Plaintiffs,

v.

JOSEPH LAWLER, et al., Defendants.

PETITION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS COMPLAINT—Filed August 9, 1957

To the Honorable, The Judges of Said Court:

The petition of Leonard M. Mendelson respectfully represents that:

1. He is attorney for defendants in the above action and is familiar with the matters herein set forth.

2. On August 1, 1955, your Honorable Court entered a Temporary Restraining Order "restraining and enjoining

the defendants from declaring the public highway of approximately five miles in length, extending from the intersection of Routes 22 and 30 to the Greater Pittsburgh Airport, and referred to in the Complaint as 'The Airport Parkway' situate in Allegheny County in said district to be a 'Limited Access Highway,' and restraining and enjoining said Defendants from interfering with direct ingress and [fol. 89] regress to and from Plaintiffs property and said highway, and enjoining said Defendants from enforcing with reference to said highway the Pennsylvania Statute of 1945, as amended in 1947, appearing in 36 P. S. 2391 et seq. . . . "

3. On May 1, 1956, this Court, sitting as a three-judge statutory court, as provided by law, entered an Order staying all proceedings in this Court until a definitive construction of the Act of May 29, 1945, P. L. 1108, as amended, 36 P. S. 2391 et seq., by the State Courts be had. The said Order, in addition, continued in force and effect the aforesaid Temporary Restraining Order until further order of this Court.

4. On December 17, 1956, the Court of Common Pleas of Dauphin County, Pennsylvania, entered an Order sustaining preliminary objections to and dismissing a Complaint filed in said Court by J. K. Creasy, William M. McNamee, Frank Ranallo, A. W. Tuiccillo, Ed Kleeman and R. G. Cumminskey, Original Plaintiffs, and Charles Sodini, Joseph Sodini, Donald Dawson, Malinda Dawson, Thomas J. Clark, George J. Paulos and Joseph Ranallo, Additional Plaintiffs, against Joseph Lawler, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania, Defendants, at No. 2183 Equity Docket and No. 90 C. D. 1956.

5. The Opinion of the Court of Common Pleas of Dauphin County filed in the aforesaid action held that plaintiffs had an adequate remedy at law and were thus not entitled to equitable relief since "all of the plaintiffs' rights can be protected and secured in a proceeding before viewers, as is provided in Section 8 of The Limited Access Highways Act of May 29, 1945, P. L. 1108, as amended, 36 P. S. 2391.8 . . .

It is not for this Court to determine whether an abutting [fol. 90] property owner has a vested property right to direct access to an existing free-access highway. If such a right exists, plaintiffs have a statutory remedy to protect that right. Should the Commonwealth proceed, then *at that time* plaintiffs will have the right to proceed before viewers on the question of their right to damages." A true and correct copy of the Opinion and Order of the said Court is attached hereto, made part hereof and marked "Exhibit A."

6. On June 29, 1957, at case No. 28 May Term, 1957, the Supreme Court of Pennsylvania affirmed the aforesaid Order of the Court of Common Pleas of Dauphin County in a Per Curiam Opinion, which adopted the opinion of the lower court.

7. On July 26, 1957, the Supreme Court of Pennsylvania denied plaintiffs' Petition for Re-argument of the case.

8. The continuance in effect of the Temporary Restraining Order entered by this Court on August 1, 1955, is of great detriment to the travelling public, which is being thereby denied the benefits of the limited access highway.

Wherefore, your Petitioner renews the Petition heretofore made and prays your Honorable Court to dissolve the Temporary Restraining Order entered on August 1, 1955, and to dismiss the Complaints filed by the original and all intervening plaintiffs.

/s/ Leonard M. Mendelson, 2330 Grant Building, Pittsburgh 19, Pa., Attorney for Defendants.

[fol. 91] *Duly sworn to by Leonard M. Mendelson, jurat omitted in printing.*

[fol. 92]

IN THE COURT OF COMMON PLEAS OF
DAUPHIN COUNTY, PENNA.

EXHIBIT "A" TO PETITION

No. 2183 Equity Docket

No. 90 C. D. 1956

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMINSKEY, on behalf of themselves and other property owners and lessees similarly situated, Original Plaintiffs,

and

CHARLES SODINI, JOSEPH SODINI, DONALD DAWSON, MALINDA DAWSON, THOMAS J. CLARK, GEORGE J. PAULOS and JOSEPH RANALLO, Additional Plaintiffs,

v.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

OPINION

BY THE COURT:

Plaintiffs have filed a class complaint in equity asking the Court to decree that the Act of May 29, 1945, P. L. 1108, as amended, 36 P. S. 2391.1 et seq., contravenes and violates the Constitution of Pennsylvania and the Constitution of the United States. The act in question is the one more familiarly known as "The Limited Access Highways Act." The plaintiffs further request that we restrain the Governor of the Commonwealth of Pennsylvania and the Secretary of High-
[fol. 93] ways of the of the Commonwealth of Pennsylvania from declaring the highway extending from the intersection of Routes 22 and 30 to the Greater Pittsburgh Airport in Allegheny County, Pennsylvania, known as the "Airport Parkway" to be a limited access highway and from inter-

fering with direct ingress and egress between plaintiffs' property and the said highway, pending hearing of the issue. They also ask that the defendants be forever enjoined from said declaration and said interference.

The defendants have filed preliminary objections to the plaintiffs' complaint in equity. Specifically, those objections are:

1. The complaint fails to state a cause of action.
2. Plaintiffs have an adequate remedy at law.
3. This Court (the Dauphin County Court) is without jurisdiction to grant the relief sought by the plaintiffs.

Exhaustive briefs have been filed by counsel on both sides of the case and detailed argument was held before the Dauphin County Court. The greater part of the argument has been directed to the various constitutional questions raised, and the act itself has been assailed for those reasons. As the complaint indicates, there is at present pending in the United States District Court for the Western District of Pennsylvania an equity suit between the same parties and involving the same issues. That case is listed as CREASY, et al. v. LAWLER, et al., Civil Action No. 13672. The same relief is asked in this last named case as in the case at bar. The District Court has entered a temporary restraining order against the defendants. The suit now before us was instituted because the Federal Judges have been unwilling to render a decision until the statute under attack has been first interpreted by the State Courts.

[fol. 94] The plaintiffs, who claim they are the owners of land and various business properties abutting upon the highway in question, are fearful that their alleged right of ingress and egress will be taken from them without compensating them therefor. They claim that as abutting property owners they have a right of direct access to the presently free-access "Airport Parkway," and that this right is a property right which cannot be taken from them without the payment of just compensation. They allege that if their direct access to the "Airport Parkway" is cut off they will not receive any compensation for the loss of their property.

On the other hand the defendants maintain that the plaintiffs are seeking to have the Dauphin County Court, sitting in equity, substitute itself for the board of viewers which is established by the provisions of the very act itself. In effect, plaintiffs ask this Court to determine whether or not a taking of property has occurred and what damages shall be awarded therefor, and that, if the depriving them of access is found to be a taking of a compensable property right, that plaintiffs' legitimate interests will be constitutionally safeguarded by a resort to viewers proceedings and, if necessary, by later appeals to the courts.

We believe that out of the many questions raised in this case there is only one which this Court is called upon to decide; namely,—Do the plaintiffs have an adequate remedy at law by which they may litigate their right to recover from the Commonwealth any and all of the rights which they claim to be theirs if the present "Airport Parkway" is declared to be a limited access highway? Our answer must be in the affirmative.

The plaintiffs herein do not contest the right of the Commonwealth to exercise its power of eminent domain. This power is so well established that it needs no citation [fol. 95] of authority to support it. At all times the plaintiffs can rely on the provisions of the Constitution of Pennsylvania, Article I, Section 10, that no private property shall be taken or applied to public use "without just compensation being first made or secured." Neither do the plaintiffs seem to question the Commonwealth's right to exercise its power of eminent domain, in that it can cut off an abutting property owner's direct access to a presently existing free-access highway. The plaintiffs' main attack here is on the right of the Commonwealth to deny an abutting property owner's direct access from his property to an existing free-access highway *without compensation*. What the property owners here are asking this Court to do is to judicially declare that an abutting property owner's direct access to the existing free-access highway is a property right for which compensation is *constitutionally* required, and later on to assess and award damages for such a taking. This, in a proceeding in equity, we cannot do. All of the plaintiffs'

rights can be protected and secured in a proceeding before viewers, as is provided in Section 8 of The Limited Access Highways Act of May 29, 1945, P. L. 1108, as amended, 36 P. S. 2391.8.

The Supreme Court of Pennsylvania has made it indisputably clear that a Pennsylvania Court, sitting in equity, has no jurisdiction to determine whether there has been a taking of private property for public use or to assess and award damages for such appropriating. See GARDNER v. ALLEGHENY COUNTY, 382 Pa. 88 (1955), where it is also held that relief is only obtainable by eminent domain proceedings. Here the Legislature, in The Limited Access Highways Act, supra, has provided a way in which every property owner may have it decided whether he is entitled to com- [fol. 96] pensation, and, if so, when, for what, and in what amounts. Where the Legislature has provided a way and a remedy, it becomes the exclusive remedy available; HASTINGS APPEAL, 374 Pa. 120 (1953); Section 13 of the Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, 46 P. S. 156. For a late case see JACOBS v. FETZER, 381 Pa. 262 (1955).

It is not for this Court to determine whether an abutting property owner has a vested property right to direct access to an existing free-access highway. If such a right exists, plaintiffs have a statutory remedy to protect that right. Should the Commonwealth proceed, then *at that time* plaintiffs will have the right to proceed before viewers on the question of their right to damages. In the orderly course of the procedure provided by The Limited Access Highways Act, they will have a right of appeal to the Common Pleas Court and a jury trial, and still later to have their rights adjudicated in the Appellate Courts. At all times their constitutional rights, whatever they may be, will be guarded and protected.

There being a full, complete, and adequate remedy at law, of which all plaintiffs can avail themselves, we, therefore, make the following

ORDER

AND Now, to wit, December 17, 1956, defendants' preliminary objections to the complaint are hereby sustained, and the said complaint is dismissed at plaintiffs' cost.

/s/ WALTER R. SOHN, J.

[fol. 96a] [File endorsement omitted]

[fol. 97]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841

JACK C. MARSHELL and ALICE E. MARSHELL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

MOTION FOR PERMANENT INJUNCTION—
Filed August 9, 1957

To the Honorable, The Judges of Said Court:

The plaintiffs by their undersigned counsel, A. E. Kountz, Edward P. Good and Kountz, Fry & Meyer, respectfully move the Court as follows:

1. That on the 1st day of August, 1955, plaintiffs filed at the above number their Complaint praying inter alia that a permanent injunction issue restraining said defendants,

[fol. 98] and each of them, from declaring the Airport Parkway to be a limited access highway and from interfering with direct ingress and egress to and from plaintiffs' property and said highway, and from enforcing the provisions of the Pennsylvania statute in question.

2. In concise form, the said Complaint and the relevant particulars as to the statute are set forth in the Order entered in this proceeding by your Honorable Court on May 1, 1956, and to which Order the plaintiffs now respectfully refer.

3. By direction or suggestion of this Court, plaintiffs filed their Civil Action in the Court of Common Pleas of Dauphin County, Pennsylvania, at No. 2183 of 1956, Equity Docket, primarily for the purpose of obtaining a "definitive construction" of the aforesaid Pennsylvania statute by the State Courts.

4. Counsel for plaintiffs believe that the direction to seek the interpretation of the State Court was only by reason of the spirit of comity, and that your Honorable Court at that time had and now has complete jurisdiction finally to determine the question without referring it to a State Court.

5. Nevertheless, as hereinabove mentioned, the plaintiffs have sought such construction in the Pennsylvania Court, and as above mentioned, have not been able to obtain it as yet. Attached hereunto and made a part hereof is the [fol. 99] Opinion of the Court of Common Pleas of Dauphin County and its Order both entered December 17, 1956, dismissing the plaintiffs' said Civil Action, or suit, in that Court without any construction or interpretation of the said statute.*

6. Thereafter from the said Order of December 17, 1956, the plaintiffs took an appeal to the Supreme Court of Pennsylvania, No. 28 May Term, 1957, and after argument thereon the Supreme Court of Pennsylvania on the 28th

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* Clerk's Note—Opinion printed page 71, supra, not duplicated here.

day of June, 1957, entered an Opinion in the following form:

"PER CURIAM. FILED: June 28, 1957.

Order affirmed on the opinion of Judge Walter R. Sohn, reported in D. & C."

7. Subsequently in the said Supreme Court of Pennsylvania at said No. 28 May Term, 1957, plaintiffs filed a Petition for Re-Argument, a copy of which is attached hereunto and made a part hereof. To that said Petition an Answer was filed by the defendants denying that a re-argument would be proper in the circumstances, and thereupon the Supreme Court of Pennsylvania on the 26th day of July, 1957, denied said Petition by an Order in the following form:

"Petition denied.
Per Curiam
July 26, 1957"

8. Said litigation in Dauphin County and the Supreme Court of Pennsylvania has covered a period of more than 16 months, and plaintiffs notwithstanding their aforesaid [fol. 100] efforts thus have been unable to obtain the construction of the statute. Plaintiffs thus have exhausted every means of obtaining the construction of the statute by the Pennsylvania Courts, while at the same time not submitting to the destruction of their rights, and property values.

9. Plaintiffs thus have endeavored to follow the direction of this Court to obtain a definitive construction of the Act of May 29, 1945, P. L. 1108 as amended (36 P. S. Sec. 2391.1 et seq.) by the State Courts; but that the State Courts as aforesaid have declined to construe the Act. The Court of Common Pleas of Dauphin County has refused equitable relief to plaintiffs, as will more fully appear by reference to the said attached copy of the Opinion.

10. That if defendants proceed to bar plaintiffs' access to the said Parkway, and then in course of time, plaintiffs

seek damages from a Board of Viewers and/or from the Court of Common Pleas of Allegheny County; and if damages are awarded, defendants thereupon under the Pennsylvania decisions may retract their order converting the said Parkway to a limited access highway and plaintiffs would be left with irreparable damages, arising out of the depreciation in the value of their properties caused by the uncertainty and in some instances the loss occasioned by the scattering of the good will, business and trade incidental to those of the plaintiffs who operate businesses on their said properties.

[fol. 101] 11. That the valuation of some of plaintiffs' properties abutting the said Parkway has already greatly declined due to uncertainty concerning the intentions of defendants and the legal rights of plaintiffs to compensation in the event that access is denied them, and will further decline in the future by reason of the uncertainty concerning the intention of the defendants and the legal rights of the plaintiffs to compensation.

12. That the Act of Assembly aforesaid under which defendants seek to deprive plaintiffs of access to the said Parkway without payment of compensation therefor, for reasons set forth in plaintiffs' pleadings and by plaintiffs in prior hearings and arguments before this Court, is unconstitutional and invalid.

Wherefore, plaintiffs now renew the application contained in their Complaint and respectfully move your Honorable Court as follows:

1. That it be ordered, adjudged and decreed that the aforesaid Pennsylvania statute of 1945, as amended in 1947, is in contravention and violation of the Constitution of the United States and the 14th amendment thereto.

2. That the said defendants, and each of them, be enjoined from declaring the said highway to be a "Limited Access Highway," and from interfering with direct ingress and egress to and from plaintiffs' property and said highway.

[fol. 102] 3. That the said defendants be restrained and enjoined from enforcing the aforesaid Pennsylvania statute with reference to the said highway.

4. That the plaintiffs be given general relief.

E. P. Good, A. E. Kountz, Kountz, Fry and Meyer, Attorneys for Plaintiffs.

[fol. 103] *Duly sworn to by J. K. Creasy, jurat omitted in printing.*

[fol. 104]

ATTACHMENT TO MOTION

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 28 May Term, 1957

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Original Plaintiffs, and CHARLES SODINI, JOSEPH SODINI, DONALD DAWSON, MALINDA DAWSON, THOMAS J. CLARK, GEORGE J. PAULOS and JOSEPH RANALLO, Additional Plaintiffs, Appellants,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

PETITION FOR RE-ARGUMENT

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

J. K. Creasy, William W. McNamee, Frank Ranallo, A. W. Tuiccillo, Ed Kleeman and R. G. Cummiskey, on behalf of themselves and other property owners and lessees

similarly situated, Original Plaintiffs, and Charles Sodini, Joseph Sodini, Donald Dawson, Malinda Dawson, Thomas J. Clark, George J. Paulos and Joseph Ranallo, Additional Plaintiffs, Appellants in the above captioned case petition your honorable court as follows:

1. On June 28, 1957, your Honorable Court affirmed the Order of the Court below, dismissing Plaintiffs-Appellants' Complaint in Equity. Your Honorable Court entered an Order Per Curiam without opinion affirming on [fol. 105] the Opinion of Judge Walter R. Sohn in the Court below, the Court of Common Pleas of Dauphin County. A copy of Judge Sohn's opinion is attached hereto.

2. Your petitioners brought this action in the Court of Common Pleas of Dauphin County upon the order of the District Court of the United States for the Western District of Pennsylvania. Plaintiffs originally began an action against defendants in the District Court and were there awarded a temporary restraining order. The District Court then while retaining jurisdiction required plaintiffs to initiate an action in equity in the Court of Common Pleas of Dauphin County, the State action was brought in order that the Courts of the Commonwealth might interpret the statute which Plaintiffs challenged on constitutional grounds, namely, the Act of Assembly of May 29, 1945, P. L. 1108 as amended, 36 P. S. 2391.1 et seq.

3. The Court below did not construe or interpret the statute in question; it stated only that Plaintiffs should wait until Defendants have acted under the authority of the statute and then they may test their remedy at law. Neither the Court below nor this Honorable Court has answered the questions raised concerning the constitutionality of this statute.

4. Appellants and, probably, Appellees desire that the rights of owners adjacent to highways which are declared to be limited access roads be defined as soon as may be. As Appellants earlier indicated in their brief they will suffer irreparable damages if Appellees proceed to bar their access to the Allegheny County Airport Parkway before Appel- [fol. 106] lees right so to do without payment of compensa-

tion is clearly established. If the highway is converted to a limited access road and subsequently it is determined that the right of access is a compensible right the conversion of the highway may be retracted leaving Appellants, with great damages and no claim for compensation.

5. Appellees have indicated that they intend to act under this statute, to convert other roads in the Commonwealth besides the Allegheny County Airport Parkway to limited access highways. While the property rights of adjacent owners remain as undefined as they are at present, it is impossible for Appellees to proceed because the expense involved in converting a highway to a limited access highway cannot even be estimated in advance.

6. The conclusion of the Court below that an injunction will not lie to prevent the conversion of this highway to a limited access highway is contrary to precedent. There are other serious Federal constitutional questions which have been raised and which the Court below did not answer.

Wherefore, your petitioners request that this Honorable Court allow re-argument in order that counsel again may present these constitutional questions to your Honorable Court for its consideration.

[fol. 106a] [File endorsement omitted]

Acceptance of service (omitted in printing).

[fol. 107]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841

JACK C. MARSHELL and ALICE E. MARSHELL, Plaintiffs,

vs.

JOSEPH LAWLER, Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

ANSWER TO PETITION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS COMPLAINT FILED AUGUST 9, 1957

Filed August 20, 1957

Plaintiffs are informed that a petition is outside of the Federal Rules of Civil Procedure, but nevertheless from an abundance of caution they are answering the petition so that nobody could infer a default.

Answering said petition of the defendants filed the 9th day of August, 1957, the plaintiffs say:

[fol. 108] 1. That the factual matters set forth in paragraphs 1 to 8 of said petition are not denied; various of the conclusions of law are denied.

2. Plaintiffs deny that the restraining order should be dissolved and deny that the complaints should be dismissed; they are advised by counsel and believe that on the contrary the complaints and the answers thereto should be heard finally by your Honorable Court, and that your Honorable Court should thereupon grant the relief prayed for in the complaints and the relief prayed for in the motion for permanent injunction filed by the plaintiffs in these proceedings on the 9th day of August, 1957.

3. All of the averments set forth in the complaints filed by the plaintiffs herein, and all of the averments set forth in the said motion of the plaintiffs filed August 9, 1957, are hereby repeated, and by such reference are now made part of this answer.

Wherefore, plaintiffs respectfully pray that the aforesaid petition of the defendants filed August 9, 1957, be dismissed.

/s/ A. E. Kountz, Kountz, Fry & Meyer, Attorneys for Plaintiffs.

[fol. 108a] *Duly sworn to by J. K. Creasy, jurat omitted in printing.*

[fol. 108b] [File endorsement omitted]

Acceptance of service (omitted in printing).

[fol. 109]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

STIPULATION OF COUNSEL RE AFFIDAVITS OF DONALD M. MCNEIL AND JOSEPH BARNETT AND ORDER THEREON— Filed September 26, 1957

It is hereby stipulated and agreed by and between counsel for plaintiffs and counsel for defendants that the Affidavits of Donald M. McNeil and Joseph Barnett, heretofore filed in support of defendants' Motion for Summary Judgment, shall be admitted to the record as depositions.

/s/ Kountz, Fry & Meyer, by Edward P. Good, Attorneys for Plaintiffs.

Richard B. Tucker, Jr., Patterson, Crawford, Arensberg & Dunn, Attorneys for Fisher Oil Co.

Mayer Sniderman, Attorney for Jos. Adams et al.

Leonard M. Mendelson, Attorney for Defendants.

[fol. 110]

ORDER OF COURT

And now, to wit, this 30 day of September, 1957, upon consideration of the foregoing stipulation, the same is hereby approved and ordered filed, and the Affidavits of Donald M. McNeil and Joseph Barnett, heretofore filed in support of defendants' Motion for Summary Judgment, are hereby admitted to the record as depositions.

/s/ Rabe F. Marsh, D. J.

[fol. 111]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

ORDER OF COURT RE SUBSTITUTION OF PARTY—October 11, 1957

And Now, the 11 day of October, 1957, the court having been informed that on October 1, 1957, Louis M. Stevens became Secretary of Highways of the Commonwealth of Pennsylvania, succeeding Joseph Lawler, upon the motion of counsel for plaintiffs and of Leonard Mendelson, attorney for the named defendants and for Louis M. Stevens, successor of Joseph Lawler as Secretary of Highways of the Commonwealth of Pennsylvania, It Is Ordered that the caption and record herein be amended by adding as a defendant, "LOUIS M. STEVENS, SUCCESSOR TO JOSEPH LAWLER, as Secretary of Highways of the Commonwealth of Pennsylvania."

/s/ Rabe F. Marsh, D. J.

[fol. 111a] [File endorsement omitted]

[fol. 112]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Plaintiffs,

vs.

LEWIS M. STEVENS, Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Civil Action No. 13841

JACK C. MARSHELL and ALICE E. MARSHELL, Plaintiffs,

vs.

LEWIS M. STEVENS, Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

Before: Staley, Circuit Judge, Marsh, District Judge, Miller, District Judge.

Opinion and Order—March 19, 1958

OPINION

Marsh, District Judge.

The plaintiffs in these actions before a statutory court[1] seek to have a statute of the Commonwealth of Pennsylvania, Act of 1945, May 29, P. L. 1108, §1 et seq., as amended, 36 Purdon's Pa. Stat. Ann. §2391.1 et seq. (hereinafter referred to as "statute"), as applied to them, declared violative of the Constitution of the United States, and to have the defendants, the Governor and Secretary of Highways of the Commonwealth of Pennsylvania, permanently enjoined from enforcing said statute. We think they are so entitled.

[fol. 113] Most of the important facts have been stipulated.[2] The plaintiffs are owners or tenants of land in Allegheny County, Pennsylvania, abutting a public highway known as the "Airport Parkway" (hereinafter referred to as "parkway"), which highway extends from U. S. Routes 22-30, with which it intersects, to the Greater Pittsburgh Airport in said county.

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[1] Convened pursuant to Title 28 U.S.C. §§2281, 2284.

[2] Stipulation of counsel filed December 19, 1955; defendants' waiver of objections to plaintiffs' findings of fact; see transcript of hearing March 22, 1956, pages 68 et seq. (sic)

Under the statute, the Secretary of Highways of Pennsylvania, with the approval of the Governor of Pennsylvania, is empowered to take over existing highways in the Commonwealth of Pennsylvania and to declare any such highway a "limited access highway" which is defined by the statute as a ". . . public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor. . . .", 36 Purdon's Pa. Stat. Ann. §2391.1. Section 8 of the statute, 36 Purdon's Pa. Stat. Ann. §2391.8, provides that ". . . the owner or owners of private property affected by the . . . designation of a limited access highway . . . shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken . . ."

The defendants admit that were it not for the restraining order and a subsequent preliminary injunction granted by this court, the parkway would have been taken over as a state highway and designated a "limited access highway" under the statute. In that event, which would be the first instance in Pennsylvania where an existing highway has [fol. 114] been designated a limited access highway under the statute, all of the plaintiffs will be denied direct access to the parkway from their land. Certain of the plaintiffs will have no means of access on any public highway, and in effect their property will be land-locked and completely inaccessible for most purposes. In declaring the parkway a limited access highway, under the authority of the statute, the Commonwealth would not take any land or improvements presently owned or leased by the plaintiffs.

Plaintiffs assert that §8 of the statute, under the present decisional law of the Supreme Court of Pennsylvania, denies them compensation for any deprivation of access not accompanied by an actual physical taking of land, and in that event they would be deprived of property without due process of law as guaranteed them by the Fourteenth Amendment of the United States Constitution.

Initially, the instant proceedings were stayed because we were of the opinion that whether a substantial federal

question was involved depended on the construction given the statute, and, further, we were unwilling to resolve that issue until the courts of the Commonwealth of Pennsylvania first had an opportunity to construe the statute in respect to the matter here in controversy.

Accordingly, the plaintiffs filed an action in equity against the defendants in the Court of Common Pleas of Dauphin County, Pennsylvania, requesting relief identical to that sought here.

Upon preliminary objections of the defendants, the Dauphin County Court dismissed the plaintiffs' complaint, holding that under §8 of the statute, the plaintiffs were [fol. 115] afforded an adequate remedy at law to test their right to damages, if any, before a board of viewers. It specifically refrained from adjudicating the pivotal issue of whether or not plaintiffs could recover damages in such proceedings. On appeal, the Supreme Court of Pennsylvania affirmed the decision of the lower court.[3]

Subsequently, the plaintiffs filed a motion here for a permanent injunction enjoining the defendants from enforcing the statute, and on the same date, the defendants moved to dissolve the preliminary injunction and to dismiss the complaint, which matters are presently before the court for decision.

Some of the plaintiffs have established on their land certain businesses, i.e., service stations, restaurants, and an amusement park. Other properties are presently occupied as residences or farms, but because of the advantage of direct access to the parkway, possess great value as potential commercial sites.

At the time these proceedings were instituted and at the present time, the parkway is the principal thoroughfare for vehicular travel between the City of Pittsburgh, Pennsylvania, and the Greater Pittsburgh Airport, and a vast number of vehicles daily pass the properties of the plaintiffs. The success of all the businesses now in existence and those contemplated by the plaintiffs, or their

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[3] Creasy v. Lawler, 389 Pa. 635, 133 A. 2d 178 (1957), in which the opinion of the Dauphin County Court is quoted verbatim and adopted per curiam.

prospective assigns, depends almost entirely on the continued enjoyment of access to the parkway.

In the past, some of the plaintiffs had been carrying on negotiations to either sell or lease their land for very attractive prices, but the negotiations were broken off by [fol. 116] the interested parties because of the publicity connected with the plans of the Commonwealth to designate the parkway a limited access highway.

It is impossible at this time to ascertain with any degree of certainty the extent or degree of damage that would be incurred by the individual plaintiffs because of the deprivation of access involved; however, it would appear from convincing testimony introduced by the plaintiffs that the properties as a whole would depreciate in value in an amount in excess of one million dollars.

The parkway is presently maintained by the County of Allegheny, having been constructed by it in 1949 after it condemned, through the exercise of its power of eminent domain, the necessary quantities of land for the right-of-way. In some instances, part of the land owned or leased by the plaintiffs was "taken". In accordance with the established law in Pennsylvania,[4] the Board of Viewers when assessing damages to the property owners for their land so taken, diminished the damages to the extent that the abutting properties were enhanced in value because of the benefits obtained by reason of the frontage on the new parkway and the access thereto.[5]

Jurisdiction

Federal jurisdiction in these cases is based on the plaintiffs' allegation of a substantial federal question, to-wit, [fol. 117] that the "Pennsylvania Limited-Access Highway

[4] Cf. In Re Appointment of Viewers, etc., 344 Pa. 5, 23 A. 2d 880, 881 (1942); see also "State Highway Law" of Pa., Act of 1945, June 1, P. L. 1242, Art. III, §303, 36 Purdon's Pa. Stat. Ann. §670-303, with regard to the present procedure in assessing damages for land taken for state highways.

[5] The defendants contend that the Viewers also considered the possibility of the parkway being subsequently designated a limited access road because the statute was then in effect. The evidence in this respect was not convincing.

Act" as applied to them is violative of the Fourteenth Amendment of the United States Constitution in that it deprives them of their property without due process of law, and denies them the equal protection of the laws. See *Del., L. & W. R.R.* v. *Morristown*, 276 U. S. 182 (1928), at 193, for a discussion of compensation as an element of due process; see also 16A C.J.S. Con. Law §646.

Each of the plaintiffs proved that if the parkway were designated limited-access, he would suffer damages in excess of the requisite jurisdictional amount,[6] and in the Marshell case, there is the additional allegation of diversity of citizenship.

Both cases were consolidated for hearing, and as required by 28 U.S.C. §2281 were heard by a three-judge court. The defendants concede that this court has jurisdiction;[7] however, relying on the authority of *City of El Paso, et al.* v. *Texas Cities Gas Co.*, 100 F. 2d 501, 503 (5th Cir. 1938), *cert. den.* 306 U. S. 650, *reh. den.* 306 U. S. 669, and *Alabama Public Service Commission et al.* v. *Southern Railway Co.*, 341 U. S. 341 (1951), contend that we should not exercise our jurisdiction and grant the extraordinary relief requested because of the disinclination of the federal courts to interfere in state matters before remedies afforded by the state have been exhausted, and, especially so, where the State Courts have not yet rendered

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[6] The defendants not only do not seriously contest that each plaintiff would suffer damages in excess of $3,000, the jurisdictional amount, but in effect so stipulated as to the original plaintiffs by advising the court that they had no objection to the plaintiffs' "Request for Findings of Fact" No. 3 (T. 3/22/56, p. 68); and as to the intervening plaintiffs, the defendants were willing to so stipulate if this court had granted the defendants' petition for an injunction they had requested during the proceedings, enjoining certain of the plaintiffs from effecting a change in the local zoning laws or improving their properties pending the outcome of these actions (T. 3/22/56, p. 122).

[7] See defendants' brief filed November 18, 1955, p. 4. Any doubt as to whether the Federal Courts have jurisdiction to determine the constitutional validity of a state statute not yet construed by the State Courts has been dispelled by the Supreme Court of the United States in Doud v. Hodge, 350 U.S. 485.

a clear or definitive decision as to the meaning of the statute.

[fol. 118] In *Alabama Public Service Comm. et al.* v. *Southern Railway Co., supra,* the Supreme Court of the United States, although assuming it had jurisdiction, refused to exercise it to examine the constitutionality of an order of the Alabama Public Service Commission denying a permit to the plaintiff to discontinue certain intrastate trains on the ground that they were being operated at a loss. The plaintiff under Alabama law had the right prior to instituting the action in the federal court to have the order reviewed by the state courts but chose not to do so. The Supreme Court declined to exercise jurisdiction as a matter of sound equitable discretion because of comity and because it concluded that the court's intervention was not required to protect the plaintiff's constitutional rights.

Likewise in *City of El Paso et al.* v. *Texas Cities Gas Co., supra,* the United States Court of Appeals for the Fifth Circuit reversed the granting of a preliminary injunction to enjoin the enforcement of a city ordinance where the plaintiff had not taken an appeal provided by state statute.

We agree that the federal courts should be reluctant to exercise jurisdiction in cases where the plaintiffs' constitutional rights will be properly protected in the state tribunal and where the statute under attack has not yet been construed by the State Courts, and this was our reason in originally staying these proceedings. However, there is another facet to be examined, and that is whether in the process of relegating the plaintiffs to the state tribunals to test the constitutionality of the statute, they will be irreparably harmed. See: *Toomer* v. *Wistell et al.*, 334 U. S. 385 (1948). [fol. 119] If the defendants proceeded with their plans to make the parkway limited-access, the businesses now established in all likelihood would have to be closed; some of the plaintiffs would not be able to make any practical use of their lands because of the loss of all access to public highways; and those plaintiffs who have conducted negotiations to sell or lease their properties for commercial uses dependent on the continued right of access would be deprived of an opportunity to realize a successful completition (sic) of the negotiations.

Hence we are persuaded that were we to refuse to exercise our jurisdiction, the plaintiffs would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts, which losses could never be recouped if the statute were eventually declared to be unconstitutional. In that event plaintiffs would be irreparably harmed.

Under these circumstances, we believe that the only proper course of conduct is for us to exercise our jurisdiction and determine whether the statute is in fact unconstitutional. Compare *Toomer* v. *Witsell, supra*, where the court held that equitable relief in enjoining the enforcement of an unconstitutional state statute was appropriate where the plaintiffs would suffer substantial losses in complying with the statute, and where they would be subject to fines and imprisonment for defiance of same. It is of interest to note that the statute in the case at hand provides for imprisonment and fines where any person violates any traffic control established for a limited-access highway by the proper authorities, §9 of the statute, 36 Purdon's Pa. Stat. Ann. §2391.9.

[fol. 120] *Eminent Domain or Police Power*

The plaintiffs contend that if the parkway is declared a limited-access highway by the defendants in accordance with the authority vested in them by the statute, the resultant total destruction of their right of access to the parkway amounts to a "taking" under the Commonwealth's power of eminent domain, thereby imposing a duty on the Commonwealth to pay them compensation.

On the other hand the defendants contend that the statute is a valid and legitimate exercise of the Commonwealth's police power, and even though property rights of the plaintiffs may be destroyed by the application of the statute, there is no duty imposed on the Commonwealth under the Fourteenth Amendment of the Constitution to pay compensation to the plaintiffs.

The power of eminent domain and the police power have been defined and contrasted by the Supreme Court of Pennsylvania in *Appeal of White*, 287 Pa. 259, 134 Atl. 409, 411 (1926), as follows:

"'Police power' should not be confused with that of eminent domain. Police power controls the use of property by the owner, for the public good, its use otherwise being harmful; while 'eminent domain' and taxation take property for public use. Under eminent domain, compensation is given for property taken, injured, or destroyed, while under the police power no payment is made for a diminution in use, even though it amounts to an actual taking or destruction of property. Under the Fourteenth Amendment, property cannot be taken except by due process of law. Regulation under a proper exercise of the police power is due process, even though a property in whole or in part is taken or destroyed."

[fol. 121] See also, *C. B. & Q. Railway* v. *Drainage Comm'rs.*, 200 U. S. 561 (1906); *New Orleans Public Service* v. *New Orleans*, 281 U. S. 682 (1930).

Though property may be regulated to a certain extent under the police power, if the regulation goes too far, it will be recognized as a taking. *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393 (1922).

The ultimate decision as to proper exercise of the police power rests with the courts, and, if the exercise goes too far, there is a judicial duty to investigate and declare the exercise of the police power invalid. *Appeal of White, supra.*

In *Penna. Coal Co.* v. *Mahon, supra,* at pages 415-416, Mr. Justice Holmes, speaking for the court, had the following to say about the police power of the Commonwealth of Pennsylvania unconstitutionally exercised by it under the "Kohler" Act which forbade the mining of coal in such a way as to cause the subsidence of dwellings:

"The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency

of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree—and therefore cannot be disposed of by general propositions."

[fol. 122] See also, *Miller* v. *City of Beaver Falls*, 368 Pa. 189, 82 A. 2d 34, 36 (1951).

The defendants cannot successfully maintain that the plaintiffs would not be deprived of property rights by the change of the parkway into a limited-access highway.

The right of access has been recognized universally as a property right which cannot be taken or materially interfered with without just compensation. 29 C.J.S. Eminent Domain, §105; 18 Am. Jur., Eminent Domain §§158, 183, and cases cited thereunder.

The Pennsylvania courts have also recognized it as a property right. *Breinig et ux.* v. *Allegheny County, et al., Appellants*, 332 Pa. 474, 2 A. 2d 842 (1938); and *Lang* v. *Smith*, 113 Pa. Super. 559, 173 Atl. 682, 683 (1934), wherein the court said:

"'That a man's right of access to his property is a valuable right which cannot be taken away without just compensation has been repeatedly recognized. . . .'"

In *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 301-302 (1905), the Supreme Court of the United States, discussing the rights of abutting property owners, stated as follows:

"'. . . The right may be regarded in the nature of an incorporeal hereditament.' . . . The general doctrine is correctly stated in Dillon on Municipal Corporations: 'For example, an abutting owner's right of access to and from the street, subject only to legitimate

> public regulation, is as much his property as his right to the soil within his boundary lines. When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property.'"

[fol. 123] We agree that the construction and designation of limited-access highways is a proper subject of police regulation and legislation by the Commonwealth insofar as it relates to the welfare and safety of the public; however, we cannot agree that a total deprivation of the right of access to an existing highway without compensation can be justified as such.

Most authorities on limited-access highways recognize that where an established "land-service" road, as is the parkway presently, in which the normal right of access has already come into being, is converted into a limited-access highway in such a manner that the existing rights of access are destroyed, the owners of such rights are entitled to compensation exactly as they would be if such rights were destroyed by any other type of construction: See: "Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street", 43 A.L.R. 2d 1072, §3, p. 1074; 18 Am. Jur., Eminent Domain §§183, 184, 185 and cases cited thereunder. See also, the following articles; *Clark, The Limited Access Highway*, 27 Wash. L. R. 111, 121 (1952); *Cunnyngham, The Limited-Access Highway from a Lawyer's Viewpoint*, 13 Mo. L. R. 19 (1948); and *Freeways and the Rights of Abutting Owners*, 3 Stanford L. R. 298 (1951). The Supreme Court of Wisconsin in the recent case of *Charles Carazalla* v. *State of Wisconsin et al.*, 269 Wis. 593, 71 N. W. 2d 276 (1955), recognizing those articles as authoritative, referred to them as follows:

> "The authors of all three articles agree that the limiting of access to a public highway through governmental action results from the exercise of the police power, and that in the case of a newly laid out or relocated highway, where no prior right of access existed on the part of abutting land owners, such

abutting land owners are not entitled to compensation. *On the other hand, the authorities cited in these articles hold that where an existing highway is converted into a limited-access highway with a complete* [fol. 124] *blocking of all access from the land of the abutting owner, there results the taking of the pre-existing easement of access for which compensation must be made through eminent domain . . .*" (emphasis ours)

These articles are also referred to as "instructive discussions" on the subject by the Supreme Court of Missouri in *State* v. *Clevenger*, 365 Mo. 970, 291 S. W. 2d 57 (1956).

Nor can the defendants successfully maintain that no taking would be involved in the deprivation of plaintiffs' access to the parkway merely because the defendants do not contemplate the destruction or physical appropriation of the plaintiffs' land. *Cf. United States* v. *Causby*, 328 U. S. 256 (1946); *Gardner* v. *County of Allegheny*, 382 Pa. 88, 114 A. 2d 491 (1955).

The Supreme Court of Pennsylvania discussed the development of the law with regard to when a "taking" has occurred in *Miller* v. *City of Beaver Falls*, *supra*, as follows:

"'. . . The law as to what constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property, and his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; "and it may be laid down as a general proposition, based upon the nature of property itself, that, *whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation*"' . . .

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". . . The Constitution of the United States and the Constitution of Pennsylvania empower the city to take and appropriate private land for public purposes. *All that is required is that just compensation be paid therefor.* We do not propose that our Federal or [fol. 125] State Constitution shall be disregarded or nullified either directly or by subterfuge, even though the purposes and objectives of a legislative act are worthy and are sincerely believed to be in the best public interest."

Therefore, we conclude that the proposed deprivation of the plaintiffs' access to the parkway would constitute a taking of property in the constitutional sense under the Commonwealth's power of eminent domain for which compensation must be paid to plaintiffs.

DOES THE STATUTE CONFORM WITH THE DUE PROCESS PROVISIONS OF THE FEDERAL CONSTITUTION INSOFAR AS IT IS AN EXERCISE OF THE COMMONWEALTH'S POWER OF EMINENT DOMAIN?

It is an arresting feature in the case at bar that while plaintiffs are most apprehensive that §8 of the statute may be construed to deny to them compensation for loss of access since none of their land will be taken, the defendants vigorously contend that such was the intention of the Pennsylvania Legislature, and that if plaintiffs are relegated to their remedy at law, the Pennsylvania Supreme Court will so hold. Moreover, the defendants frankly assert that they would also urge this construction of the statute on the Pennsylvania Courts.[8] Both sides have presented persuasive argument and Pennsylvania decisions to support this interpretation.

But defendants contend that the statute is constitutionally sound because §8 thereof provides plaintiffs with an opportunity to test their right to compensation in the State Courts beginning with a board of viewers.

[fol. 126] Plaintiffs contend that we should examine this

[8] Transcript of hearing (11/18/57), p. 41; see also, *id.*, pp. 4, 31, and transcript of hearing (2/12/57), pp. 8-9.

statute and determine whether or not it provides them with a certain and reasonably prompt right to compensation for loss of access where there is no taking of their land. They argue that if it does not, the statute, inter alia, is violative of due process under the Fourteenth Amendment. They earnestly urge upon us that if the statute is unconstitutional, it would be highly inequitable to compel them to pursue a remedy at law in the State Courts, only to have it judicially determined that plaintiffs cannot recover compensation under the statute,—the very result which plaintiffs fear and of which defendants are convinced.

Without venturing to predict the ultimate decision of the Pennsylvania Courts on the issue of compensation, we think in these circumstances it is our duty now to examine §8 of the statute, construe it in the light of the pertinent Pennsylvania Supreme Court decisions, and determine whether as an exercise of the Commonwealth's power of eminent domain, it conforms with the due process requirements of the Fourteenth Amendment with respect to the deprivation of plaintiffs' right of access to the parkway.

We begin with general principles.

"As a general rule, the exercise of the power of eminent domain that is, the taking of private property for public use, is subject to the constitutional right of the owner of the property taken to just compensation, regardless of the manner in which the property is appropriated, or whether it is used for the purposes for which it is taken." 29 C.J.S. Eminent Domain §97; see also, 12 Am. Jur. Constitutional Law §658.

[fol. 127] "The constitutional guaranty as to just compensation for property taken for public use is paramount to any statute, and a statute not in keeping with such guaranty is unconstitutional." 29 C.J.S. Eminent Domain §98.

"A statute authorizing an exercise of the power of eminent domain is inoperative and will not support condemnation proceedings *unless it provides for certain and reasonably prompt compensation to the owner of the property taken . . .*" 29 C.J.S. Eminent Domain §99. (emphasis supplied)

"While the manner in which payment is to be made is ordinarily within the province of legislative discretion, *the method of compensation prescribed must be such as to preserve inviolate to the owner absolute assurance of compensation before he is required to surrender possession of his property.*" 29 C.J.S. Eminent Domain §99. (emphasis supplied)

In §8 it is provided that owners of private property such as plaintiffs ". . . shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken . . ." If the Legislature meant to identify or equate the term "property" with "land", it seems quite clear that it intended to deprive the plaintiffs of compensation for the loss of the incorporeal property right of ingress or egress to, from or across a limited-access highway.

We have referred to the Pennsylvania Legislative Journal for help in determining precisely what the Pennsylvania Legislature intended when it provided that the Commonwealth would not be liable for consequential damages "where no property is taken" in the designation of an existing highway as a limited-access highway, but we find [fol. 128] the journal devoid of all discussion or information in this regard.[9]

Decisions of the Pennsylvania Supreme Court dealing with the liability of the Commonwealth for damages in road cases have denied compensation for damages which occur where there is less than the actual and physical taking of land or ground for the construction or improvement of a highway.

In *Soldiers' and Sailors' Memorial Bridge*, 308 Pa. 487, 162 Atl. 309, 310 (1932), where no land was taken, the Supreme Court of Pennsylvania denied compensation for the impairment of access and deprivation of light sustained by the plaintiff as the result of the erection of a bridge by the Commonwealth in the center and within the boundary lines of a street on which the plaintiff's property abutted.

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[9] See Vols. III and IV, Pa. Legislative Journal, 1945.

In *Brewer et ux., appellants* v. *Commonwealth*, 345 Pa. 144, 27 A. 2d 53 (1942), the Pennsylvania Supreme Court denied a plaintiff whose land abutted a highway compensation for damages sustained as the result of a change of grade where no land belonging to the plaintiff was physically taken.

In *Heil* v. *Allegheny County*, 330 Pa. 449, 199 Atl. 341 (1938), a state highway on which plaintiff's land abutted was relocated, but since none of the plaintiff's land was taken or seized in the relocation, he was denied damages resulting from the diminution of the value of his land resulting from the diversion of the traffic.

The theory in the earlier decisions was again given support in the case of *Koontz* v. *Commonwealth*, 364 Pa. 145, 70 A. 2d 308, 309 (1950), where the Supreme Court of Pennsylvania said:

> [fol. 129] "It is, of course, not open to dispute that, before the Commonwealth can be made to answer, in the present state of the statute law . . . *for damages in cases of highway improvement, there must have been a taking of the complaining property owner's land* . . ." (emphasis supplied)

In a more recent decision of the Superior Court of Pennsylvania, *Moyer* v. *Commonwealth*, 183 Pa. Super. 333, 132 A. 2d 902 (1957), the court specifically held that the impairment of a landowner's ingress and egress to a highway resulting from its relocation 30 feet away, and the building of fill in front of the landowner's property, *without the taking of land*, was not compensable under the Pennsylvania "State Highway Law".[10]

Interpreting the statute in the light of the foregoing cases,[11] we conclude that the Pennsylvania Legislature did

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[10] Supra, f.n. 4.

[11] It would necessarily follow from the decision in Doud v. Hodge, supra, at p. 487, that in the absence of a construction of a state statute by the State Courts, this court may construe the statute in order to determine its federal constitutionality. Cf. Versluis v. Town of Haskell, Okla., 154 F. 2d 935 (10th Cir. 1946); Virginia Surety Co. v. Knoxville Transit Lines, 135 F. Supp. 606 (E.D. Tenn. 1955); Day v. North Am. Rayon Corp., 140 F. Supp. 490 (E.D. Tenn. 1956).

not intend to compensate those abutting land owners whose land is not physically taken, but whose right of access to an existing highway is destroyed by the designation of that highway as a limited-access highway.[12] For that reason, we think the statute is repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

We are especially persuaded to this conclusion by the fact that §8 of the statute provides that damages for the taking of property for limited-access highways in town-[fol. 130] ships and boroughs, as here, shall be paid in the same manner as now provided by law, to-wit, the "State Highway Law". That law, as construed by *Koontz* v. *Commonwealth, supra,* and *Moyer* v. *Commonwealth, supra,* does not impose liability on the Commonwealth for damages where no land is taken.[13]

Moreover, we have found no other general law of Pennsylvania which, under accepted principles,[14] could be read in conjunction with the present statute so as to make the payment of compensation to the plaintiffs possible.

The defendants submit that even if we hold §8 of the statute to be unconstitutional, the remaining provisions of the Act are valid because the statute contains a "severability clause" (§15, 36 Purdon's Pa. Stat. Ann.,

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[12] Cf. the Pennsylvania "Statutory Construction Act", 1937, May 28, P.L. 1019, art. I, §1 et seq., as amended, 46 Purdon's Pa. Stat. Ann. §501 et seq., especially §§351, 552(4) with regard to ascertaining the intent of the Legislature in the enactment of a law.

[13] The federal courts are bound by the interpretation placed by the highest court of a state upon a statute of that state. Georgia Ry. & Electric Co. v. City of Decatur, 295 U. S. 165 (1934); Burns Mortgage Co. v. Fried, 292 U. S. 487 (1934); Hartford Accident & Indemnity Co. v. Nelson Co., 291 U. S. 352 (1934); United States ex rel. Touhy v. Ragen, 224 F. 2d 611 (7th Cir. 1955), *cert. den.* 350 U. S. 983; McClaskey v. Harbison-Walker Refractories Co., 138 F. 2d 493 (3d Cir. 1943).

[14] Cf. In re Sharett's Road, 8 Pa. 89 (1848); see also cases cited in 29 C.J.S. Eminent Domain §99, f.n. 96.

§2391.15).[15] However, we think that the remaining provisions of the statute as excised from §8 cannot stand alone when applied to these plaintiffs because there is no method provided therein by which plaintiffs may be compensated for the taking; therefore, we cannot refuse to grant the relief prayed for by the plaintiffs on that account.

[fol. 131] *Six Per Cent Argument*

To bolster their argument that the plaintiffs are not entitled to any compensation from the Commonwealth for the taking of their right of access to the parkway, the defendants advance a further interesting theory to the effect that historically in Pennsylvania the land taken for roads and highways is regarded a little differently than land taken for other public uses because in the original grants or patents from the Commonwealth, there were contained reservations to the Commonwealth of 6 acres out of every 100 acres for roads, and the Legislature may so use the land reserved without paying the value of it to the grantee, his heirs or assigns. See *Plank-Road Company* v. *Thomas*, 20 Pa. 91, 93 (1852); *Workman* v. *Mifflin*, 30 Pa. 362 (1858); *Township of East Union* v. *Comrey*, 100 Pa. 362 (1882); *Herringtons' Petition*, 266 Pa. 88, 109 Atl. 791 (1929). See also, 35 Dick. L. R. 192 (1931) for an interesting historical discussion of this rule.

Though the defendants' argument appears plausible, we cannot subscribe to it as sufficient cause for holding that these plaintiffs are not entitled to any compensation for the taking of their existing right of access to the parkway.

We cannot believe that the original grantors ever envisaged limited-access highways, but rather were concerned equally with the construction of roads for the benefit of the land owners as well as the public using the road. We believe this sentiment is expressed in an early case alluding to the rule, *McClenachan* v. *Curwin*, 3 Yeates (Pa.) 362 (1802), where the court said at pages 372-373:

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[15] Even if the statute did not contain a severability clause, the Pennsylvania Statutory Construction Act, §55, 46 Purdon's Pa. Stat. Ann. §555, which provides for severability generally in any statute would apply.

[fol. 132] "Although in this early arrangement, there might be a chance that certain purchasers might be obliged to contribute more than the 6% to the roads, yet it might possibly have been foreseen, that scarce any instance of that would occur, without an equivalent likewise accruing to the purchaser, from the vicinity of such public roads to their buildings and improvements."

The so-called "Six Per Cent Rule", when closely scrutinized, is essentially based on a contractual relationship, the plaintiffs' original predecessors in title having received, in the form of the additional 6 acres, consideration for the right of the Commonwealth to later use the additional acreage for roads. However, we believe that the original agreements did not encompass a situation whereby the original patentees or their privies would be deprived of access to any road so built, and for this reason we can only conclude that the plaintiffs through their predecessors in title have never been compensated in any form for the particular right of which the defendants now seek to deprive them. The point we are developing is that contractually the original patentees, or their privies, the plaintiffs, have never received consideration for their being deprived of access to a road constructed on the reserved acreage.

Although it might be argued that restricting access is actually using "property" for road purposes, the original reservation seems to apply only to land actually used for road construction and to unimproved land, *Plank-Road Co.* v. *Thomas*, *supra*, at page 94. These are additional matters taking this present set of facts out of the operation of the rule.

[fol. 133] *Conclusion*

For the foregoing reasons we believe the complete deprivation of the plaintiffs' present right of access to the Airport Parkway would constitute a "taking" by the Commonwealth under its power of eminent domain for which the plaintiffs should be compensated in money damages. We do not consider the complete deprivation

by law of the right of access as being within the principle of "damnum absque injuria".

Since the "Pennsylvania Limited Access Highway Act" in its present form, as we construe it and as counsel for the defendants argues, denies the plaintiffs compensation for the proposed taking, the defendants should be permanently enjoined from enforcing it over the plaintiffs' protest.

In arriving at this conclusion, we need not consider the further arguments advanced by plaintiffs, namely, that the statute denies them equal protection of the laws because the Pennsylvania Turnpike Act permitting the Pennsylvania Turnpike Authority to take land for the construction of the Turnpike provided for the payment of consequential damages;[16] and that the Commonwealth is estopped from denying damages to the plaintiffs for the destruction of their right of access because when its political subdivision, the County of Allegheny, originally condemned the property in quo, the County obtained a reduction in the damages otherwise payable to the plaintiffs because of the benefits they would derive from the right of access to the parkway after it was constructed. Neither need we consider the plaintiffs' argument with regard to the impairment of obligation of contract.

An appropriate order will be entered permanently enjoining the defendants from enforcing the statute against the plaintiffs.

[fol. 134] FINAL DECREE

This cause having come on to be heard on December 2, 1955, February 13, 1956, March 22, 1956, February 12, 1957, and November 18, 1957, before a duly constituted district court of three judges convened pursuant to Title 28 U.S.C. §§2281, 2284, and all parties being represented by counsel, and the cause, by agreement of all parties, having been submitted upon final hearing, upon the pleadings, stipulations of the parties, oral argument, briefs of

[16] Also under the proviso in §8 it appears that some abutting property owners may in some circumstances secure compensation for consequential damages while others may not.

counsel for the parties, and the complete record of the proceedings, and this court having duly made its findings of fact and conclusions of law in the opinion filed herewith,

Now, Therefore, It Is Finally Determined, Ordered, Adjudged and Decreed that the defendants, Lewis M. Stevens, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania, be and they hereby are permanently enjoined from enforcing or otherwise complying with the Pennsylvania "Limited-Access Highways Act", 1945, May 29, P. L. 1108, §1, et seq., as amended, 36 Purdon's Pa. Stat. Ann. §2391.1 et seq., so as to interfere with or deprive the plaintiffs of their right of ingress or egress to, from or across the "Airport Parkway" in Allegheny County, Pennsylvania.

Austin L. Staley, Circuit Judge, John L. Miller, District Judge, Rabe F. Marsh, District Judge.

March 19, 1958

[fol. 134a] [File endorsement omitted]

[fol. 135]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13672

J. K. CREASY, WILLIAM W. MCNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN and R. G. CUMMISKEY, on behalf of themselves and other property owners and lessees similarly situated, Plaintiffs,

v.

LEWIS M. STEVENS, Successor to JOSEPH LAWLER, as Secretary of Highways of the Commonwealth of Pennsylvania, and GEORGE M. LEADER, Governor of the Commonwealth of Pennsylvania, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 9, 1958

I. Notice is hereby given that Lewis M. Stevens, Successor to Joseph Lawler, as Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania, the defendants above named, hereby appeal to the Supreme Court of the United States from the Final Decree granting a permanent injunction, dated and entered in this action on March 19, 1958.

This appeal is taken pursuant to 28 U.S.C. §1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 136] 1. Transcript of docket entries.

2. Complaint (filed August 1, 1955)

3. Motion for Temporary Restraining Order and Temporary Restraining Order (filed August 1, 1955)

4. Answer (filed August 26, 1955)

5. Defendants' Motion for Summary Judgment (filed August 26, 1955)

6. Amendment to Complaint (filed September 2, 1955)

7. Answer to Amendment to Complaint (filed September 7, 1955)

8. Request for Admissions (filed October 18, 1955)

9. Response to Request for Admissions (filed October 26, 1955)

10. Motion to Amend Motion for Summary Judgment and Order (filed November 16, 1955)

11. Affidavits of Leonard P. Kane, Samuel Rothman, Maurice L. Kessler, Albert W. Tuccillo, J. K. Creasy (filed November 25, 1955)

12. Affidavit of J. Cal Callahan (filed November 29, 1955)

13. Affidavit of Pawel and Mary Werbitsky (filed December 2, 1955)

14. Affidavit of Donald M. McNeil (filed December 2, 1955)

15. Affidavits of Alvin H. Mitchell and Edward K. and Marcella A. Nanz (filed December 2, 1955)

16. Transcript of Pre-Trial Hearing and Argument on Motion for Summary Judgment (held December 2, 1955)

17. Motion to Amend Answer and Order (filed December 16, 1955)

18. Stipulation of Counsel (filed December 19, 1955)

19. Order of Court (filed December 19, 1955)

20. Transcript of Pre-Trial Conference Held February 13, 1956

[fol. 137] 21. Order Dismissing Defendants' Motion for Summary Judgment (filed February 20, 1956)

22. Stipulation of Counsel (filed March 21, 1956)

23. Transcript of Hearing on Motion for Interlocutory Injunction and For Continuance of Restraining Order Held March 22, 1956.

24. Order of Court (filed May 1, 1956)

25. Petition to Dissolve Temporary Restraining Order and to Dismiss Complaint (including opinion and order of the Court of Common Pleas of Dauphin County, Pennsylvania, attached thereto) (filed August 9, 1957)

26. Motion for Permanent Injunction (filed August 9, 1957)

27. Answer to Petition to Dissolve Temporary Restraining Order and to Dismiss Complaint (filed August 20, 1957)

28. Stipulation of Counsel (filed September 26, 1957).

29. Order of Court (filed October 14, 1957)

30. Transcript of Hearing Held November 18, 1957.

31. Opinion and Final Decree (filed March 19, 1958)

32. This Notice of Appeal to The Supreme Court of The United States together with proof of service thereof.

III. The following questions are presented by this appeal:

1. In an action to enjoin enforcement of a state statute, may a federal statutory court predicate its granting of equitable relief upon the ground that irreparable loss would be incurred during the time required to litigate the issue of constitutionality in the state courts, where the highest state court has already affirmed the availability of those courts to try the issue and has already upheld the constitutionality of that statute in litigation between the same parties?

[fol. 138] 2. Where Pennsylvania's highest court has held that a Pennsylvania statute, which authorizes the limiting of access to a public highway, affords an abutting property owner a means for recovering damages if found constitutionally entitled thereto, may a federal statutory court thereafter nonetheless enjoin enforcement of that statute because it independently concludes that the owner is constitutionally entitled to damages and that the statute does not make provision therefor?

3. Does the Constitution of the United States require Pennsylvania to compensate an abutting land owner or tenant for his loss of access resulting from the conversion of an unlimited access highway to a limited access highway where no land is taken?

4. Does a state statute providing for the limiting of access to a public highway, without liability on the part of the state for payment of consequential damages in the absence of a taking of property, deprive an abutting land owner or tenant of his property without due process of law or deny him the equal protection of the laws or impair the obligations of his contracts?

Leonard M. Mendelson, Counsel, Harry J. Rubin, Deputy Attorney General, Thomas D. McBride, Attorney General, Attorneys for Defendants.

Department of Justice, Commonwealth of Pennsylvania, State Capitol, Harrisburg, Pennsylvania.

[fol. 139] Proof of service (omitted in printing).

[fol. 139a] [File endorsement omitted]

[fol. 140] Clerk's Certificate (omitted in printing).

[fol. 141]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—Oct. 13, 1958

Appeal from the United States District Court for the Western District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 13, 1958

IN THE

Supreme Court of the United States

October Term, 1957

Nos. 157 and

LEWIS M. STEVENS, SUCCESSOR TO JOSEPH LAWLER, AS SECRETARY OF HIGHWAYS OF THE COMMONWEALTH OF PENNSYLVANIA, AND GEORGE M. LEADER, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellants

v.

J. K. CREASY, WILLIAM W. McNAMEE, FRANK RANALLO, A. W. TUICCILLO, ED KLEEMAN AND R. G. CUMMISKEY, ON BEHALF OF THEMSELVES AND OTHER PROPERTY OWNERS AND LESSEES SIMILARLY SITUATED,

Appellees (No.)

and

JACK C. MARSHELL AND ALICE E. MARSHELL,

Appellees (No.)

On Appeal from the United States District Court for the Western District of Pennsylvania.

JURISDICTIONAL STATEMENT

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